

AN
ESSAY
ON
USES AND TRUSTS,
AND ON THE
Nature and Operation
OF
CONVEYANCES AT COMMON LAW,
AND OF THOSE, WHICH DERIVE THEIR EFFECT FROM
THE STATUTE OF USES.

FOURTH EDITION,
REVISED, CORRECTED, AND CONSIDERABLY ENLARGED.

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IN TWO VOLUMES.
VOL. I.
OF USES AND TRUSTS.

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AS an acknowledgment for the information, which I have received, during my attendance for many years at the CONVEYANCING COUNSEL'S CLUB, of which I am a Member, and for the uniform kindness, which I have experienced from the individuals composing it, I embrace, with peculiar satisfaction, the opportunity of dedicating to the other Members of the Club, the FOURTH EDITION of this ESSAY. From the nature of their professional studies and pursuits, they are best qualified to discover the merit, if any, which it may possess ; and, I am satisfied, they will be indulgent, and make some allowance for the errors, which, no doubt, it contains.

F. W. SANDERS.

Lincoln's Inn,
Dec. 1823.

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ESSAY

ON

USES AND TRUSTS.

CHAP. I.

*Of Uses and Trusts before the Statute of
27 Hen. 8. c. 10.*

1. PREVIOUSLY to the statute 27th Hen. 8. c. 10. (usually called the statute of uses), the use was an equitable, or beneficial, interest, distinct from the legal property in the land. Upon principles, established in the courts of equity, the use itself was alienable by the *cestuique use*, and the statute of 1 Rich. 3. enabled him to convey the possession, without the concurrence of his trustee: and ultimately, the statute 27 Hen. 8. c. 10. converted the equitable, or beneficial, interest of the *cestuique use*, into a legal estate. I shall endeavour in this chapter to trace the origin, progress, and learning of the use in its fiduciary state.

SECT. I.

Definition of
the use.

The statute 1 Rich. 3. having described the fiduciary interest, which it was meant to affect, by the single word, *use*, it became necessary to ascertain, with precision, the meaning of the word. An equitable interest, not a use within the statute, may with propriety be called a trust.

It will be therefore proper to define the use; and with reference to the statute of 1 Rich. 3. it is important to ascertain the distinction between uses and trusts.

The use was said to be, “ a trust or confidence, which is not issuing out of land, “ but as a thing collateral, annexed in privity “ to the estate, and to the person, touching “ the land; scil. that *cestuique use* shall take “ the profits, and that the terretenant shall “ make estates according to his directions^a.”

The use consisted^b of three parts; that the feoffee would suffer the feoffor to take the profits: that the feoffee upon request of the feoffor, or notice of his will, would execute the estates to the feoffor, or his heirs or any other by his direction: that if the feoffee had been disseised, and so the feoffor disturbed,

^a 1 Co. 121. a. Co. Litt. 272. b.

^b Bacon, Uses, 10.

the feoffee would re-enter, or bring an action to recontinue the possession^o.

SECT. I.

Definition of the use.

II. Sir Francis Bacon^d says, “where the
 “trust is not special, nor transitory, but ge-
 “neral and permanent, there it is a *use*.” A
 feoffment was made in fee, by which the pos-
 session, or seisin, was transferred to the feof-
 fee; and a confidence, or trust, was placed
 in him to permit the feoffor, or any other
 person, and his heirs, to receive the rents and
 profits; and also to make such legal estates,
 as he or they should direct. This confidence
 was the use: for the feoffee had a permanent
 estate in fee in the lands, subject to the use,
 or distribution of the profits. The fiduciary
 or beneficial interest was commensurate to
 the legal estate. But a trust did not make
 this regular division of property into use and
 possession; it signified, that the grantor had
 executed a conveyance of the lands, by which
 he had not only transferred the possession,
 but also the use, or right to take the profits;
 reposing a personal trust in the grantee, that
 he would retain both, in order to answer
 some special purpose. Thus if he made a
 conveyance in trust, or to the intent, that
 the grantee should convey to a third person,
 the trust placed in the grantee was not to

SECT. II.

Distinction be-
tween uses and
trusts.

^c See Year Book 2 Edw.
4. 2. b.

^d See Bacon, Uses, 9.

SECT. II. pay over the profits, but to dispose of the profits and the possession^a.

Distinction between uses and trusts.

So if a man had enfeoffed another to the intent, or in trust, to be re-enfeoffed ; or to the intent to be vouched^b; or to the intent to

^a In the following license to alien is the form of an ancient grant of the kind. From the style of this King, I suppose it was in the reign of Henry the sixth.

“ Henry by the grace of
“ God king of England,
“ France, and lord of Ire-
“ land. To all to whom these
“ present letters shall come,
“ greeting. Know ye, that
“ of our own special grace
“ and inconsideration of 20
“ mares paid to us in our
“ Hanaper Office, we have
“ granted, and have given
“ license for ourselves and
“ our heirs, as much as in us
“ lay, to our dearly beloved
“ Richard Cornewayle, Esq.
“ that he may enfeoff Tho-
“ mas Whitten, Esq. Wm.
“ Bourne, Esq. Jno. Hude-
“ nett, Esq. Thos. Bulles-
“ don, Clerk, of his castle
“ and village of Stepulton in
“ the Marches of Wales,
“ adjacent to the county of
“ Salop, together with the
“ appurtenances thereof,
“ which are held of us in
“ capite. To have and to
“ hold to the same Thomas,
“ William, John, and Tho-
“ mas, and their heirs, of
“ us or our heirs, by due
“ and customary service, in

“ order that they may be en-
“ abled to give and grant in
“ full and peaceable seisin
“ the aforesaid castle and
“ village, with the appurte-
“ nances, to the said Ri-
“ chard and Cecilia his wife,
“ and the heirs of the bo-
“ dies of the said Richard
“ and Cecilia; and if the
“ aforesaid Richard and Ce-
“ cilia depart this life with-
“ out any heir of their two
“ bodies, the aforesaid cas-
“ tle and village, with the
“ appurtenances, shall re-
“ main to the right heirs of
“ the same Richard, to be
“ held of us and our heirs
“ by the aforesaid service.
“ And we give by these
“ presents license to the
“ same Thomas, William,
“ John, and Thomas, that
“ they may receive him the
“ aforesaid Richard, and
“ hold the aforesaid castle
“ and village to themselves
“ and to their heirs, to hold
“ as aforesaid. In witness
“ whereof we hereby cause
“ these letters to be made
“ patent. Witness my self at
“ Gloucester, the 24th Nov.
“ in the ninth year of our
“ reign.”

(Signed) “MAPLETON.”

^b Bacon, Uses, 8.

suffer a recovery^h; none of these intents, or trusts, were uses.

SECT. II.

Distinction between uses and trusts.

The trust above described is called by Sir Francis Bacon, “the special trust lawfulⁱ.” But there is a special trust unlawful, which, he says, was created to the intent, “to defraud creditors, or to get men to maintain suits, or to defeat the tenancy to the præcipe, or the Statute of Mortmain, or the lords of their wardships, or the like; and those are termed frauds, covins, or collusions.”

In another place he adds^k (speaking of the special trust lawful), “And this we call confidence, and the Books do call them, intents; and therefore these three are to be distinguished, and not confounded; the covin, confidence, and use.”

Upon the introduction of uses, the Court of Chancery assumed an exclusive jurisdiction over them; and during the exercise of that jurisdiction previously to the statute of uses, its decisions were not free from the scruples of the common law: and from considerations arising from the laws and principles of tenure, and from the nature of the

^h 2 Salk. 676. See Shep. Touch. 652.

ⁱ Bacon, Uses, 8.

^k Page 9.

SECT. II. limited and inferior estates of tenants in tail, for life, and for years, it was determined, that neither tenant in tail, for life, nor for years, could stand seised to a use. The trust therefore declared upon the estate, or seisin, of a tenant, having a limited interest, was not, strictly speaking, a use^a.

Distinction between uses and trusts.

It must follow, that if the Court of Chancery did not acknowledge the beneficial interest of the *cestuique trust*, he was without remedy; and consequently, that in those cases, where the trust was declared upon the seisin or estate of a person, not capable, according to the then contracted rules of equity, to stand seised to a use, the *subpœna* did not lie against the trustee to compel him to perform the trust.

It is probable, that the distinction, which has been taken between uses and trusts, may to some appear controvertible. But the opposers of it must contend, that the special trust before described, and the trust declared upon the seisin of a tenant in tail, or for life, and upon the possession of a tenant for years, was within the statute 1 Richard 3. c. 1.; and consequently, that the *cestuique trust* might have conveyed the legal estate with-

^a Vide post.

out the concurrence of the trustees, in whom it was vested : a construction, which, so far as it concerns the special trust, and the trust declared upon the possession of a tenant for years, would lead to practical consequences of considerable importance, but which I shall attempt to shew in a subsequent part of this essay, is not tenable.

SECT. II.

Distinction between uses and trusts.

III. It is impossible to fix the precise period, when the use or trust was introduced into England : but conjecture has not been idle in attempting to supply the want of positive information. I do not mean to inquire, as to the origin of those personal trusts, which are better known in our law by the name of deposits, or bailments ; for imagination can scarcely trace a period so remote, in which man, in society, was not sometimes induced to entrust another with the object of his care, or the fruits of his industry.

SECT. III.

The introduction of trusts.

A special trust seems to have been the root from which the permanent use arose ; or, as Lord Bacon observes^b, “ a trust was “ the way to a use :” and in another place, “ the special intent unlawful and covinous, “ was the original of uses, though after it “ induced to the lawful intent, general and “ special ” The progress indeed from the

^b Bacon, Uses, 9.

SECT. III.

The introduction of trusts.

trust created for a special or transitory purpose to the general or permanent use, seems to be so natural, that the proof of it does not require the aid of authority^c.

Mr. Selden^d has stated, that “Ethelred, Ealdorman of *Mercland*, had all that, which “was the kingdom of *Mercland*, to his own “use, as an ealdorman, and fief, given him “in marriage with Ethelfleda by her father “King Alfred. *Londoniam caput regni Merciorum* (saith *William of Malmesbury*) *cui-dam primario Ethelredo, in fidelitatem suam cum filia Ethelfleda concessit.*” He adds, “that after Alfred’s death, his son Edward “was King of Westsex and *Mercland*, but “so, that he was King of *Mercland* in name “only; the whole possessions remaining to “Earldorman Ethelred. *Duo regna Merc-*

^c Yet the point seems to have been discussed in Lord Dacre’s case, 27 Hen. 8. 7. b. (Year Book). The question was whether a use was devisable? It was contended, that the use being a novelty in the law, it could not be devised, because a devise, at that time, must have been supported by a custom. It was answered by York, that a use was merely a trust, which was at common law; for confidence was necessary between man and man; and that this trust was always

saleable or grantable at pleasure, by assurances not applicable to the transfer of the land itself. York’s argument appears to be erroneous; for admitting that a trust in the general sense of the word, was co-eval with the law, yet it is evident, that the permanent division of property into the legal, and beneficial interest, distinct from each other, was an invention to evade or lessen the force of some pre-existing law.

^d Tit. Hon. 510.

“ orum et West Saxonum conjunxerat ; Mer- SECT. III.
 “ ciorum nomine tenus, quippe *commendatum* The introduc-
 “ Duci Ethelredo, tenens.” tion of trusts.

According to Sir Martin Wright^b, the word *commendatum*, suggests a *trust* : and indeed considering this gift by Alfred according to the modern construction of a conveyance, it would appear to be an assurance, not operating upon the legal, but merely upon the beneficial interest ; for Alfred gave the kingdom of Mercland to Ethelred, as the marriage-portion of his daughter, and yet the legal estate appears to have continued in Edward the son and heir of Alfred.

But it is evident, that Mr. Selden considered the case as amounting to a Saxon tenure, and not to a trust ; and there is no ground for supposing, that Alfred voluntarily converted himself into a trustee, when he might have effected the same purpose by a simple gift, modified in any manner, suitable to his wishes, and without assuming an office, incompatible with his situation, as Sovereign^c.

^b Tenures, 47. Note C.

^c Mr. Sharon Turner, in the 2d vol. of his History of the Anglo-Saxons (173), states a similar grant. “ The King gives a manor to Edred, and permits Edred to give it to Lulla and Sigethrythe, who are en-

“ joined to give part of the
 “ land to Eaulfe and Here-
 “ wine: but Eaulfe was to
 “ give half of this part to
 “ Biarnulve, and to enjoy
 “ the other half for his own
 “ life, with the power of
 “ devising it, as he pleased.”

SECT. III.
The introduc-
tion of trusts.

It has been argued with much propriety, that uses could not have existed before the statute *quia emptores terrarum*, 18 *Edw.* 1. which abolishes the immediate tenure between the feoffor and feoffee. "In ancient books "no mention is made of a use; and if any "use had been at the common law, it would "have been specified in the ancient books of "our law: and thus it seems to me, that "before the statute of *quia emptores terrarum*, "if one had made a feoffment in fee, the law "would have created a tenure between the "feoffor and the feoffee; which tenure is a "*consideration*; and by such consideration "the feoffee would have been seised to *his* "*own use*: and so before that statute, there "was no use by reason of the consideration "before mentioned^a."

It has been supposed, that trusts were known in the reign of Henry the third. This opinion^b is occasioned by the statute of Marlbridge^c, which relieves against false

^a Per Pollard, 27 H. 8. 9. a. Year Book. But see Bro. N. C. 60. and March's N. C. 128. where it is said, *et opinio fuit*, that a use was at common law before the statute of *quia emptores terrarum*; but uses were not common before the same statute. And see note to pl. 2. 22. Vin. 179.

^b See Bro. N. C. P. 59. 60.

^c 52 Hen. 3. c. 6. "As "touching them that use to "enfeoff their eldest sons "and heirs being within "age, of their heritage, for "to defraud the lords of "the fee of their ward- "ships, it is provided, ac- "corded, and agreed, that

and covinous feoffments, made to defraud the chief lords of their wards. The statute, however, does not, I apprehend, warrant this conclusion. For as to the opinion, that the feoffor, in the case of a feoffment to his eldest son, or heir within age, took the profits for his own use, it is, as Sir Francis Bacon observes, a conceit; for although the profits were taken to the use of the son, it was still a feoffment within the statute^d: and as to the second case mentioned by the statute, that certainly alludes to feoffments upon condition, and not upon trust^e. There is ground to conclude, that neither uses nor trusts were known at that time, from the circumstances attending the succeeding king's reign (Edward the first): for the clergy, who were then endeavouring, *arte vel ingenio*, to bring lands into mortmain without license, were not, it seems, acquainted with the uti-

SECT. III.

The introduction of trusts.

“ by occasion of any such
 “ feoffment no chief lord
 “ shall lose his ward. (2.)
 “ Moreover, touching them
 “ that fain false feoffments
 “ of their lands, which they
 “ will lease for term of years
 “ to defraud the chief lords
 “ of their wards, wherein
 “ it is contained that they
 “ are satisfied of the whole
 “ service due unto them
 “ until a certain term, so
 “ that such feoffees are
 “ bound at the said term to

“ pay a certain sum to the
 “ value of the same lands,
 “ or far above; so that after
 “ such term, the land shall
 “ return unto them, or to
 “ their heirs, because no
 “ man will be content to
 “ hold it upon the price; it
 “ is provided and agreed
 “ that by such fraud no
 “ chief lord shall lose his
 “ ward.”

^d Bac. Uses, 25.^e See 2 Inst. 111. Poph.

SECT. III.

The introduc-
tion of trusts.

lity of trusts. The statute *de religiosis*^f, which was principally made to prevent alienations in mortmain, takes no notice of them : and if uses or trusts had been then known, it is most probable, that the clergy, who were more conversant in the civil law than the laity, would have taken advantage of them.

It has been argued, that trusts were early received, on account of the writ called *causa matrimonii prælocuti*^g. Thus, if a woman had given lands in fee, or for life to a man, to the intent that he should marry her, the common law gave her this writ of *causa matrimonii prælocuti*, to recover her lands, in case the marriage did not take effect^h. So if the woman had given the lands to a stranger, to the intent, that he should reconvey them to her and her intended husband, the same writ was allowed herⁱ. This writ, it must be observed, was granted to the woman by the common law, which is alone a conclusive reason, that the confidence reposed in the husband, or stranger, was not a use nor trust ; for it is a rule, that whenever a remedy is given against uses or trusts, that remedy is afforded by an *express statute*,

^f 7 Edw. 1. See Bac. 25.

Poph. 77.

^g Vide Year Book 27

Hen. 8. 10.

^h F. N. B. 471.

ⁱ Ibid. 472.

and not by the *common law*^s. It has been further said^t, that trusts were introduced in the reign of Edward the second; but I have found no instance of a trust, which can support that opinion".

SECT. III.

The introduction of trusts.

Trusts, however, were certainly frequent during the reign of Edward the third. *Brooke*, in a note upon a case reported in the year book of that monarch's reign^v (where feoffees were sued by petition), thinks it worthy of observation, that trusts were known in those days^x. And although Sir Francis Bacon says^y, that this case, and the book of 8 *Ass.* (where a fine was levied *in autre droit*), are but implications of no moment; yet the statute 50 Edw. 3. c. 6. clearly proves, that *special trusts* were then in practice. The statute runs thus: "Because that divers people
"inherit of divers tenements, borrowing di-
"vers goods in money, or in merchandise, of
"divers people of this realm, do give their
"tenements and chattels to their friends by
"collusion thereof to have the profits at their
"will, and after do flee to the franchise of

^s Poph. 77. Bac. Uses, 23.

^t Brent's case. 2 Leon. ca. 25. per Harpur.

^v I observe, however, that Mr. Daines Barrington, in his Observations upon the Statutes (403. note i.), says,

there is an Irish Statute against secret feoffments, so early as the third of Edward the 2d, styled the statutes of Kilkenny.

^v 44 Ed. 3. 25.

^x Bro. Feof. al. Uses, 9.

^y Bac. Uses, 23, 24.

SECT. III.
The introduc-
tion of trusts.

“ Westminster, of St. Martin le Grand, of
“ London, or other such privileged places,
“ and there do live a great time with an high
“ countenance of another man’s goods, and
“ profits of the said tenements and chattels,
“ till the said creditors shall be bound to
“ take a small parcel of their debt, and re-
“ lease the remnant. It is ordained and as-
“ sented, that if it be found that such gifts
“ be so made by collusion, that the said cre-
“ ditors shall have execution of the said te-
“ nements and chattels, as if no such gifts
“ had been made^a.”

^a By a subsequent statute,
1 Rich. 2. c. 9. “ Because
“ it is complained to the
“ King that many people of
“ the said realm, as well
“ great as small, bearing
“ right and true title, as
“ well to lands, tenements,
“ and rents, as in other per-
“ sonal actions, be wrong-
“ fully delayed of their
“ right and actions, by
“ means that the occupiers
“ or defendants to be main-
“ tained and sustained in
“ their wrong, do common-
“ ly make gifts and feoff-
“ ments of their lands and
“ tenements which be in
“ debate, and of their other
“ goods and chattels to
“ lords and other great men
“ of the realm, against
“ whom the said pursuants
“ for great menace, that is
“ made to them, cannot,
“ nor dare not, make their
“ pursuits: and also on the

“ other part complaint is
“ made to the King, that
“ oftentimes many people
“ do disseise other of their
“ tenements, and anon, af-
“ ter the disseisin done,
“ they make divers alien-
“ ations and feoffments,
“ sometimes to lords and
“ great men of the realm
“ to have maintenance, and
“ sometime to many persons
“ of whose names the dis-
“ seisees can have no know-
“ ledge, to the intent to de-
“ fer and delay by such
“ frauds the said disseisees
“ and the other demandants
“ and their heirs, of their
“ recovery, to the great
“ hindrance and oppression
“ of the people; it is or-
“ dained and established,
“ that from henceforth no
“ gift or feoffment of lands,
“ tenements, or goods, be
“ made by such fraud or
“ maintenance; and if any

IV. The earliest mention, which I find, of the word *use*, is in the statute of provisors, 7 Rich. 2. c. 12.^x; and Bacon considers the first practice of uses to be about that reign^y. It is likely, however, that uses of the permanent kind before described were known in the preceding king's reign; for as in their commencement uses were of a secret nature (the use being originally created on the state of the feoffee merely by a *parol* declaration), it is probable, that they were not noticed by the legislature, until they had gained some degree of notoriety. In a case before cited^a, Manwood says, "I have seen divers ancient deeds of uses, and in ancient times you shall not find that any would purchase

SECT. IV.

Introduction of
uses.

"be in such wise made, they
"shall be holden for none
"and no value; and the
"said disseisees shall from
"henceforth have their re-
"covery against the first
"disseisors, as well of the
"lands and tenements, as
"of their double damages,
"without having regard to
"such alienations, so that
"the disseisees commence
"their suits within the year
"next after the disseisin
"done. And it is ordained
"and established, that the
"same statute shall hold
"place in every other action
"in plea of land where such
"feoffments be made by
"fraud or collusion, to have
"their recovery against the
"first such feoffor. And

"it is to wit, that this sta-
"tute ought to be under-
"stood where such feoffors
"thereof take the profits."

^x "And moreover it is
"assented, that if any alien
"have purchased, or from
"henceforth shall purchase,
"any benefice of holy
"church, dignity, or other
"thing, and in his proper
"person take possession of
"the same, or occupy it
"himself within the realm,
"whether it be to his own
"proper use, or to the use
"of another, without espe-
"cial license of the King,
"he shall be comprised
"within the same statute."

^y Bac. 24.^a Brent's case, 2 Leon.
15.

SECT. IV. "lands to himself alone, but had two or three
 Introduction of "joint feoffees with him, and he who was
 uses. "first named in the charter of feoffment, was
 " *cestuique use*, although that no use was *de-*
 " *clared* to him upon the livery; and so it
 " was known by the *occupation* of the lands.
 " And the reason why no mention is made in
 " our ancient books of uses, is, because men
 " were then of better consciences than now
 " they are; so as the feoffees did not give oc-
 " casion to their feoffors to bring *subpœnas* to
 " compel them to perform the trusts reposed
 " in them."

In consequence of the secret manner in which uses were at first declared, and of the difficulty of obtaining evidence of the object of the parties, and the extent of the beneficial interest, by the ordinary proceedings of a court of law, it has been said, that John Waltham, who was Bishop of Salisbury, and Chancellor to King Richard the second, by a strained interpretation of the statute of West. 2. devised the writ of *subpœna*, returnable in the Court of Chancery only^b.

SECT. V. V. The use afforded the clergy an oppor-
 History of uses "tunity of avoiding the statutes of mortmain;
 to the reign of "for although they could not buy lands in their
 Rich. 3.

^b 3 Black. Com. 52. See and Gilb. Forum Romanum, 17.
 Mr. Cruise's valuable Digest, 1 vol. 396. & seq.

own names, yet they might evade the statutes by obtaining grants, not directly to, but to the *use* of their religious houses. But the legislature interfered, and by a statute made 15 Rich. 2. c. 5.^a, it was enacted, that the lands so purchased to uses should be amortized by license from the crown, or sold to private persons; and that uses should be subject for the future to the statutes of mortmain, and be forfeitable like the lands.

SECT. V.

History of uses
to the reign of
Rich. 3.

^a “ And moreover it is
 “ agreed and assented, that
 “ all they that be possessed
 “ by feoffment, or by other
 “ manner, *to the use of re-*
 “ *ligious people*, or other
 “ spiritual persons, of lands
 “ and tenements, fees, ad-
 “ vowsons, or any other
 “ possessions whatsoever,
 “ to amortize them, and
 “ whereof the said religious
 “ and spiritual persons take
 “ the profits, that betwixt
 “ this and the feast of St.
 “ Michael next coming,
 “ they shall cause them to
 “ be amortized by the li-
 “ cense of the King and of
 “ the Lords, or else that
 “ they shall sell and alien
 “ them to some other use
 “ between this and the said
 “ Feast, upon pain to be
 “ forfeited to the King, and
 “ to the Lords, according to
 “ the form of the statute of
 “ religious, as lands pur-
 “ chased by religious peo-
 “ ple; and that from hence-
 “ forth no such purchase be
 “ made, so that such re-
 “ ligious or other spiritual
 “ persons take therefore the
 “ profits as afore is said,
 “ upon pain aforesaid, and
 “ that the same statute ex-
 “ tend and be observed of
 “ all lands, tenements, fees,
 “ advowsons, and other
 “ possessions, purchased, or
 “ to be purchased, to the
 “ use of guilds or fraterni-
 “ ties. And moreover it is
 “ assented, because mayors,
 “ bailiffs, and commons of
 “ cities, boroughs, and other
 “ towns, which have a per-
 “ petual commonalty, and
 “ others which have offices
 “ perpetual, be as perpe-
 “ tual as people of religion,
 “ that from henceforth they
 “ shall not purchase to them
 “ and to their commons, or
 “ office, upon pain contain-
 “ ed in the said statute de
 “ religiosis. And whereas
 “ others be possessed, or
 “ hereafter shall purchase
 “ to their use, and they
 “ thereof take the profits,
 “ it shall be done in like
 “ manner as is aforesaid of
 “ people of religion.”

SECT. V.

History of uses
to the reign of
Rich. 3.

The disputes between the Houses of York and Lancaster originated in the reign of Richard the second. It was natural, that men, becoming parties to these unfortunate quarrels, should seek the means of retaining their estates in their own families by preserving them from forfeiture. This was effected by the aid of uses. The most plain and simple plan was that of conveying lands, in the lifetime of the grantor, to such uses as were directed in the deed, or by parol declaration. By another, a power was given over the use which was not suffered by the common law over the land; that of devising. As the legal estate was vested in the feoffees by either of these dispositions, the lands were exempted from forfeiture. The causes then, which induced men to continue uses at this period, were extremely different from those of their production. Their origin was occasioned by fraud; their continuance proceeded from landable motives.

During the civil commotions, which attended the troublesome reigns of Richard 2. and Henry 4. most of the lands in the kingdom were conveyed to uses. A practice so general could not escape the notice of the legislature; and therefore in some general acts, as in 21 R. 2. c. 3. and in some particular ones, as in the case of the Duke of Northum-

berland^b, forfeitures for treason were extended not only to the lands, of which the person attainted was himself seised, but to those whereof he was seised as *césti que use*.

SECT. V.

History of uses
to the reign of
Rich. 3.

During the reigns of Henry the fourth, Henry the fifth, and Henry the sixth, I find only three statutes relating to *trusts*. The statutes of 4 Hen. 4. c. 7. and 11 Hen. 6. c. 3. were enacted to confirm and enlarge the 1 Rich. 2. c. 9. before stated. But by the 5th chap. of the 11 Hen. 6. it appears, that tenants for lives or years, who were subject to actions of waste by the reversioner, upon their commission of it, had taken advantage of the doctrine of trusts, in order to escape punishment, by conveying their estates to friends in trust for themselves, and afterwards committing waste upon the lands at their pleasure: they still continuing to occupy the premises, and to take the profits to their own use: for the reversioner being ignorant of the *legal* owner of the lands, did not know against whom to bring his action: “It is therefore ordained and established, “that they in the reversion, in such case, “may have and maintain a writ of waste “against the said tenants for term of life, of “another’s life, or for years, and so recover

^b See the Year Book 11 Hen. 4. 52. pl. 30.

SECT. V. “ against them the place wasted, and their
 History of uses “ treble damages for the waste by them done,
 to the reign of “ as they ought to have done for the waste
 Rich. 3. “ committed by them before the said grant
 “ and lease of the estate.”

In the 5th Hen. 5.^c it appears, that a case arose, upon the nature and extent of the estate of cestuique use. A man being seised of a manor to which an advowson was appendant, conveys the manor to feoffees to his own use, and afterwards is outlawed in an action of debt. During the outlawry, the church becomes vacant, and the cestuique use presents to the church; the King brings his *quare impedit*, and the case was determined in his favour; for cestuique use, as tenant at will to his feoffees, had a possession, which was forfeited to the crown by the outlawry.

But the great point seems to have been settled in the 4th Ed. 4.^d, that cestuique use could obtain no relief in the courts of common law against his feoffees, but must rely upon the equitable jurisdiction of the Court of Chancery. But even in this King's reign the principles of equity were so little understood, that it was determined, that the *sub-pœna* did not extend to the *heir* of the feof-

^c Year Book 5 Hen. 5.
 3. 6. Bro. Feoff. al. Uses,
 pl. 45.

^d 4 Ed. 4. 8. b. pl. 9.

fee, who was in by law ; but relief in such cases could only be had by his bill in Parliament°. SECT. V.
History of uses
to the reign of
Rich. 3.

From the 11th Hen. 6. to the reign of Rich. 3. (which includes a space of fifty years), the Statute Book is totally silent upon the subject of uses. From this circumstance Sir Francis Bacon concludes, and there is ground to believe, that uses were most favoured about that time. The statute of 1 Rich. 3. c. 1. materially increased the power of cestuique use.

This statute recites, "That forasmuch as Stat. of 1 Rich.
3. c. 1.
" by privy and unknown feoffments, great
" usurety, trouble, costs, and grievous vex-
" ations daily grow betwixt the King's sub-
" jects, insomuch that no man that buyeth
" any lands, tenements, rents, services, or
" other hereditaments, nor women that have
" jointures or dowers in any lands, tene-
" ments, or other hereditaments, nor men's
" last wills to be performed, nor leases for
" term of life or years, nor annuities granted
" to any person or persons, for their services

* Year Book 8 Ed. 4. 6. ferences to the Year Books ;
22 Ed. 4. 6. Carey, 13. 9 Hen. 4. 3. 12 Hen. 4. 21.
But this was soon reme- 1 Hen. 5. 4. 33 Hen. 6. 15.
died. See Keilw. 42. b. 5 Ed. 4. 7. 3. 7 Ed. 4. 14.
They who wish to examine 18 Ed. 4. 11. 7 Ed. 4. 29.
the early decisions upon 17. and generally to Bro.
uses and trusts, may be tit. Feoff. al. Uses.
assisted by the following re-

SECT. V. “for term of their lives, or otherwise, be in
 Stat. of 1 Rich. “perfect surety, nor without great trouble
 3. c. 1, “and doubt of the same, because of such
 “privie and unknown feoffments: for the
 “remedy whereof it is ordained, established,
 “and enacted, by the advice of the Lords
 “spiritual and temporal, and the commons
 “in this present parliament assembled, and
 “by authority of the same, that every estate,
 “feoffment, gift, release, grant, leases, and
 “confirmations of lands, tenements, rents,
 “services, or hereditaments, made or had, or
 “hereafter to be made or had, by any person
 “or persons being of full age, of whole
 “mind, at large, and not in duress, to any
 “person or persons, and all recoveries and
 “executions had or made, shall be good and
 “effectual to him to whom it is so made,
 “had, or given, and to all others to his use,
 “against the seller, feoffor, donor, or granter
 “thereof, and against the sellers, feoffors,
 “donors, or granters, his or their heirs,
 “claiming the same only as heir or heirs to
 “the same sellers, feoffors, donors, or grant-
 “ers, and every of them, and against all
 “others having or claiming any title or in-
 “terest in the same, only to the use of the
 “same seller, feoffor, donor, or granter,
 “sellers, feoffors, donors, or granters, or his
 “or their said heirs, at the time of the bar-
 “gain, sale, covenant, gift, or grant made:
 “saving to every person or persons such

“ right, title, action, or interest, by reason SECT. V.
 “ of gift in tail thereof made, as they ought Stat. of 1 Rich.
 “ to have had if this act had not been made.” S. c. 1.

VI. This statute was evidently intended SECT. VI.
 for the benefit of purchasers, by giving the The operation and effect of the
 cestuique use an alienable power over the pos- stat. 1 Rich. 3.
 session, as well as the use. But the intention
 of the legislature was frustrated; for the sta-
 tute did not deprive the feoffees of the power
 of alienation; and consequently if they alien-
 ed the land for a valuable consideration, and
 without notice, previously to any disposition
 made by cestuique use pursuant to the statute,
 such alienation disabled cestuique use from
 exercising the power which the statute meant
 to afford him. Besides this inconvenience,
 there was a still greater produced by the sta-
 tute; for it often occasioned a kind of double-
 handed proceeding, or fraud, both in the
 feoffees and cestuique use. The feoffees had
 a power over the possession by the common
 law, and the cestuique use by the statute.
 They often colluded, and by making secret
 and different feoffments, they purposely de-
 feated each other's alienation, with a view to
 deceive purchasers.

(1.) It has been a question of some im- Of the aliena-
 tion of the ces-
 tuique use.
 portance, and perhaps never decided, whe-
 ther in some cases any or what part of the
 estate of the feoffees continued in them after

SECT. VI. the feoffment of, or alienation by, the cestuique use.

The operation
and effect of the
stat. 1 Rich. 3.

In fee.

If cestuique use in fee-simple had made a feoffment in fee-simple, according to the statute 1 Rich. 3. c. 1. it seems, that the whole interest of the feoffees was thereby conveyed. So if there had been cestuique use in fee-simple, and he had made a feoffment in fee-simple, upon condition of re-entry, and the condition was afterwards broken, and the cestuique use had entered; the estate of the feoffees was not restored by such entry^a.

Of cestuique use
in tail, &c.

But notwithstanding the alienation of cestuique use in fee had this effect by the statute of 1 Rich. 3. there was a distinction, when cestuique use had only a limited estate in the land, as an estate for life or in tail, with a remainder over.

In a case^b in the seventh year of Edward the sixth's reign, one Davis, being seised in fee, enfeoffed J. L. and others in fee, in the 19th year of Henry the eighth, to the use of his wife for life, remainder to his brother in tail, remainder to B. H. in tail, remainder to the right heirs of the feoffor. Afterwards,

^a 21 Hen. 7. 25. Bro. tit. Feof. al. Uses, pl. 18. Co. Litt. 103. a.

^b Davis's case, Dyer, 88. b. 89. a.

in the 24th Henry 8. Davis and his wife levied a fine with proclamations to Sir H. W. and others in fee, to the use of Sir H. W. and his heirs in fee. The brother, the first in remainder, joined in this fine. Sir T. W. son and heir of Sir H. W. bargained and sold the lands to the King in fee. After this the brother died without issue, and then the wife died. J. L. the surviving feoffee, brought his petition, and this matter was found by the verdict. In arrest of judgment it was alleged on the part of the King, that the petition did not lie for the feoffee, because the fee-simple of the use was lawfully conveyed to Sir H. W.; and therefore J. L. the feoffee, could not enter to revive the use; because he could not be seised of the fee-simple in the same manner as he was before the alienation. This case does not appear to have been determined; and therefore Dyer adds, “*et ideo quære inde.*”

SECT. VI.

The operation
and effect of the
stat. 1 Rich. 3.

However, in a case sent from the Chancery for the opinion of the Judges^a, they were in favour of this opinion. It was thus: there was cestuique use in tail, remainder over in tail, remainder to the first cestuique use (in tail) in fee. Cestuique use in tail before the 27th Hen. 8. made a feoffment in fee to the use of himself for life, remainder to his first

^a Baskerville's case, Dyer, 58. a. Zouche's case, 329. b. 330. a. Vide

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The operation
and effect of the
stat. 1 Rich. 3.

son (being heir in tail) and his wife for their lives, remainder to the use of the heirs of their bodies, remainder to the use of the right heirs of the feoffor. The statute 27 Hen. 8. c. 10. is passed, and the feoffor dies. The son and his wife enter: and then the first feoffees enter, to revive the former uses in tail. Dyer and Manwood were both of opinion, that the entry of the feoffees was unlawful; for that the fee-simple in the use was lawfully transferred, and the right of the feoffees bound by the statute of 1 Rich. 3. Therefore, by their entry, the feoffees could not have their former estate; that is to say, the fee-simple. This opinion was sent into Chancery by those Judges, and Catlyn and Saunders were of the same opinion.

On the other hand, it was expressly stated, in the beginning of the reign of Henry the seventh^c, that if cestuique use *in tail* made a *feoffment* in fee, the feoffees might enter after the death of cestuique use in tail, for the purpose of revesting the former uses; and that a feoffment by cestuique use *for life* operated only upon his estate for life; and consequently did not create a forfeiture. This opinion, it seems, was adopted in the reign of Henry the eighth: for Brooke^d says,

^c Bro. tit. Feof. al. Uses, pl. 22. 4 Hen. 7. 18.

^d Bro. tit. Fines, pl. 107.

Vide also Dyer, 57. b. p. 1. as to a lease by cestuique use for life.

that there was then no occasion for entry or claim, within the five years, to avoid a fine levied by cestuique use *for life* with proclamations; such fine not working a forfeiture. The rule, that neither a feoffment nor fine by cestuique use for life amounted to a forfeiture of his estate, must have been established upon one of these grounds; that by the feoffment or fine the use and legal estate passed to the grantee *during the feoffor's life*, while the remainder continued in the first feoffees; or that, by the fine or feoffment, a base fee passed to the grantee, determinable upon the death of cestuique use by the entry of the feoffees.

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and effect of the
stat. 1 Rich. 3.

Delamere's case^f was, in substance, thus : R. D. in the 13th Hen. 8. enfeoffed T. S. and others in fee to the use of himself and his wife, and the heirs of their two bodies; and in default of such issue, remainder to R. D. in tail; remainders over. R. D. in the 26th Hen. 8. enfeoffed W. D. in fee; afterwards R. D. died, and the heir of the surviving feoffee entered to revive the ancient uses; and upon solemn argument it was held, that the entry of the feoffees was lawful. It was said in this case, that by the feoffment of R. D. the fee-simple in the lands passed; but that after the death of the

^f Plowd. 348 to 353. 1 Co. 128.

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and effect of the
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feoffor the feoffees might re-enter to revive the ancient uses; but that, although this right of entry remained in the feoffees, yet until their regress the fee-simple was out of them. This case was considered as establishing a principle different from the determination in the case cited from *Dyer*; and it was observed, that this was determined upon solemn argument, but that from *Dyer* was only the opinion of the Judges, without any argument^s.

The case from *Dyer* appears irreconcilable to the first case cited from *Brookes's Abridgment*; but perhaps it is not altogether inconsistent with *Delamere's* case. The statute of Richard renders the feoffment of cestuique use valid against all claiming any title or interest in the lands only to the use of the feoffor *or his heirs*. Now when the feoffor in the latter case died, the feoffees did not claim to the use of the heirs, but of the wife, of the feoffor; in which case they were neither restrained by the statute, nor the common law. But in the case from *Dyer*, the first feoffees certainly did claim to the use of the *heir* in tail of cestuique use. The only doubt appears to have been, whether the words of the statute, “claiming the same *only as heirs* of the feoffor, &c.” should

^s 1 Co. 128. b. 129. a.

extend to the heirs *special* as well as *general*^b.

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If the case from Dyer be correctⁱ, a feoffment by cestuique use *in tail*, after the statute of Richard the third, had the same operation in barring the claims of the issue, as a fine would have had^b. I say, as a *fine* would have had; for notwithstanding the effect of it was at first doubted, it appears to have been settled^c, that a fine would have bound the issue in tail of cestuique use, and also the entry of the feoffees, while they claimed to *the use of the issue*. But according to the doctrine in Delamere's case, neither the feoffment nor the fine would have barred any remainder expectant on the determination of the estate tail; for whenever the entail ceased, the feoffees would have had a right to enter to revive the ancient uses; in that case they would not have claimed to the use of the feoffor, or his heirs, but to the use of a stranger. I must observe, that Gilbert^d, in his *Treatise on the Law of Uses and Trusts*, seems to have been in an error, when he asserts, that a recovery suffered by a cestuique, use in trust, did not, after the statute 1 Rich. 3. bind the issue in tail: for notwith-

^b See B. N. C. 147.

ⁱ Dyer, 329.

^b Sed contra Year Book
19 Hen. 3. 13. 4 Hen. 7.

^c B. N. C. 146. March
N. C. 140. Year Book

27 Hen. 3. 20.

^d Gillb. Uses, 32.

SECT. VI. standing the doubt entertained in 30 Hen. 8.^e,
 The operation and effect of the
 stat. 1 Rich. 3. it appears from the words of, and the subsequent construction upon, the statute, that the recovery bound the issue claiming as heirs *only* of the grantor or recoverer^f.

Of trusts and
 interest not
 within the statute 1 Rich. 3.

(2.) When the statute 1 Rich. 3. passed, the use, as Sir Francis Bacon observes^g, appeared “in his likeness; for there is not a “word spoken of *taking the profits* to describe a use by, but of *claiming to a use*.” The statute does not even mention the words *trust* and *confidence*, which are so particularly expressed in the statute 27 Hen. 8. c. 10. It is evident, that the statute extended merely to uses declared upon a seisin or legal estate in fee^h: and that a trust or confidence declared upon the seisin or estate of a tenant in tail, or for life, or the possession of a lessee for years, was not a fiduciary interest, within the meaning of the use described by the statute. This construction was adopted, when courts of equity, tinctured with the prejudices of the common law, had conceived, that the estates of tenant in tail, for life, and years, were, from

^e Vide Bro. N. C. 147.

^f “It was holden *per plures* in the Chancery, “if a recovery be had, in “which cestuique use in “tail is vouched, and the “demandant recovers, then “this shall bind the issue.” Bro. Feoff. al. Uses, pl. 56.

March’s N. C. 137. See also the Year Book 19 H. 8. 13. Bassett and Morgan v. Manxell, Plowd. 4.

^g Bac. Uses, 27.

^h See 1 Co. 128. a. b. Year Book 19 Hen. 8. 13. 4 Hen. 7. 13. Bassett v. Manxell, Plowd. 3.

their nature, incapable of being conveyed to a use.

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For as to the estate or seisin of a tenant in tail, it was held, that no use could be limited upon it: 1st, because the tenure of itself created a valuable consideration; 2d, because the statute *de donis* had appropriated and fixed the estate tail to the donee and the heirs of his body, so that neither he, nor they, could execute the useⁱ. I must here observe, that the exception in 1 Rich. 3. extended only to tenant in tail of the legal estate, and not to cestuique use tenant in tail^k.

Estates tail.

With respect to the estate or seisin of tenant for life, the consideration of tenure between the lessor and lessee appears to have been incompatible with the use. It is expressly stated in 2 Roll. Abr. 781. pl. 6. that if a lease be made for life, that shall be to the use of the lessee; and in Dyer (8b.) it is said that, "if the feoffees make a lease for life, or an estate tail; in these cases if they be argued closely, the law will prove, that the lessee or donee cannot be

Estates for life.

ⁱ "It was adjudged by the advice of all the justices, that tenant in tail could not stand seised to a use." Year Book 27 H. 8. 10. a. 2 Co. 78. a. Bro. Feof. al. Uses, pl.

40. Co. Litt. 19. b. Plowd. 555. 2 Roll. Ab. 780. Jenk. Cent. 195. Gilb. on Uses 11. 205. and the note to 22 Vin. 181. pl. 2.

^k B. N. C. 146.

SECT. VI. “seised to an use.” This I apprehend to have been the law, notwithstanding any inference to the contrary, which may be raised from an expression in Brooke, Feoff. al. Uses, pl. 40. that where rent is reserved, there, though a use is expressed to the donor, it is a consideration, that the donee shall have it to his own use. The point, indeed, now, is rendered of no importance, as the stat. 27 H. 8. certainly extends to a trust declared upon the seisin of a tenant for life. But in fact, there could have been no difference between a lease for life, and a lease for years; and I shall proceed to shew, that a trust declared upon the possession of a tenant for years, was not within the statute of 1 Rich. 3.: and indeed it is of real consequence, that this point should be understood.

Estates for
years.

To apply this learning to modern practice, and to put a probable case: suppose A. possessed of the legal and absolute interest of 1000 years, and that he assigns over his term to B. in trust for himself, and then makes a feoffment in fee. This plan is frequently adopted for the purpose of acquiring a freehold by disseisin, and at the same time of providing against a forfeiture of the term by the entry of the remainder-man. But the intention of the parties would be frustrated, supposing the trust declared upon the term of 1000 years to be a *use* within the statute of

1 Rich. 3. In such case the *legal* estate of SECT. VI.
 B. (according to Delamere's case, and the The operation and effect of the
 words of the statute) must pass by the feoff-stat. 1 Rich. 3.
 ment of A. Now that feoffment must either
 create a freehold by disseisin, or it must operate merely to the extent of the term; the latter construction would not answer the purpose; and by the former, A. would be exposed to the forfeiture, which he intended to prevent. So it is usual for a tenant for life, who is about to make or concur in a conveyance, which may expose him to the forfeiture of his life estate, to make a previous demise of the lands to a trustee for 99 years (if he shall so long live) in trust for himself. It is therefore, as I observed before, of real consequence, that it should be ascertained, whether the trust of a term of years *can in any case* be considered within the statute of Rich. 3.

I conceive, that upon an attentive perusal of the authorities upon the subject, we may collect these points: first, That the statute of Richard was intended only to extend to *uses* properly so called; or, in other words, it has never been construed to comprise such fiduciary interests, as at the time of the act were not cognizable by the court of chancery; and secondly, That a termor or lessee for years could not at that time stand seised either to an *implied* or *express* use; or, to ex-

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plain myself more clearly, that the subpœna was not issuable against him for the purpose of compelling him to perform the trust declared upon his lease; because it was supposed, that the contract between the lessor and lessee, and the consideration upon which the latter took the lease, were incompatible with, and repugnant to, the nature of a use, declared to any other person.

I mention this rule as the construction of the court of chancery, before the statute of uses, when it is well known, that that court still favoured the conclusions of the common law. The use or trust declared upon the estate of a lessee for years was in fact the *jus precarium*; the cestuique trust having nothing to depend upon, but the honour and conscience of his trustee. It was not till after the statute of uses, that the court of chancery, acting upon more liberal principles, and being under the necessity of once more watching over the consciences of men, found an opportunity of supporting that as a *trust*, which the courts of common law rejected as a *use*, and of adopting a system in respect to the former, which is attended with all the benefits, and without any of the inconveniences, of the latter. On the other hand, the courts of equity have never considered any fiduciary interest as a *use*, which was not considered as such before the statute 27 Hen. 8. Such a

construction would not have answered the purposes of equity. Thus, for instance, no use, as I have mentioned, could be declared upon a lease for years, and it was not within the nature of 27 Hen. 8.; yet the court of chancery conceived, that the confidence reposed in the lessee was as much to be observed in equity, as any other kind of use or trust. How was this confidence to be supported? Certainly not as a use, but as a trust, which the court of chancery could fashion according to the more modern notions of equity. If it had been supported as a use, it must have been adopted with all its defects. But it is certain, that the trust, declared upon a term of years, differs in most essential points, from what a use formerly was.

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Thus all the questions concerning the capacity of persons to stand seised to a use are avoided in the case of modern trusts; as the courts of equity fasten the trust upon the estate, and not upon the person. So there could be no implied use upon a lease for years^m, but trusts by implication are perhaps more frequent upon terms for years, than any other kind of propertyⁿ. The wide difference in their construction between a modern trust of

^m This is a point universally acceded to by writers on the subject. See the cases before cited, and

Perk. s. 536. Dyer, 10. a.

ⁿ See also many other instances, post, ch. 3.

SECT. VI. a term of years, and a use before the statute
 of uses, forms, in my opinion, a very conclu-
 sive reason in favour of the position before
 submitted, that the former never has been,
 nor can be considered as the use described by
 the statute 1 Rich. 3.

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I shall now add the authorities, confirming the points in question ; from which it will be perceived, that although the court of chancery, soon after the death of Hen. 8. had in some measure overcome its scruples, by allowing the *subpœna* to issue against the lessee for years, being a trustee ; it was not till after the reign of Elizabeth, that the trusts declared upon a term were held even assignable in equity ; it being at the same time recollected, that a *use* was always transferable in chancery¹.

It may not be improper to premise, that the title of the act of 1 Rich. 3. c. 1. is in these words : “ All acts made by or against a “ *cestuique use* shall be good against him, his “ *heirs*, and *feoffees in trust*.” It would be

¹ Upon examining the reference to Brooke, pl. 60. and Crompton, 66. a. in the second edition of this work, there appears to be a mistake in the passage. The words in the original are, “ *notwithstanding the sta-*

tute 1 Rich. 3.” Upon consideration, however, the reference is evidently to the statute 3 Hen. 7. c. 4. and not to the statute of Richard ; and consequently not applicable to this place.

impossible to use words more inapplicable to a trust declared upon a possession of a lessee or assignee for a term of years. The word *seised*, in the statute of uses 27 Hen. 8. was held sufficiently expressive to exclude leases or terms for years: it appears to me, that the words "*feoffees* and *heirs*," as fully express the meaning of the legislature.

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The lord chancellor, in Easter term 22 Eliz.², put this question to the judges: A. being possessed of a lease for a term of years, granted all his *estate* and *interest* to B. and C. and their assigns, to the use of the said A. and his wife, for the term of their lives, and of the longer liver of them; and afterwards the said A. gave to a stranger such interest as he then had in the said lands in lease, and died: whether this grant made by A. gave all the term of B. and C. or not? And it was answered by all the justices and the chief baron, that the gift or grant of him, in trust for whom the term was granted, was void and out of the *statutes of cestuique use*: and in a note by the editor it is said, "*and 1 R. (c. 1.) 'and 27 Hen. 8.'*" for which he cites Ridley's case. The observation, which Crompton (who wrote in the latter part of Elizabeth's reign) makes upon the case from Dyer, is much to the purpose; "*Mes donc d'un terme pur ans*

* Dyer, 369. a.

SECT. VI. "al use est bon matter *a c'est jour* in conscience, et que il avera *subpœna* in le chauncerie^a." This remark clearly proves, that cestuique trust of a term was not *formerly* entitled to the subpœna.

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Jenkins, mentioning this case (244, case 29), says, "The husband cannot assign this *trust*, for a *trust* is nothing in law, and uses being abolished and joined to the possession, this *trust* cannot be said to be a use." In page 245, he adds, "Equity gives relief upon a devise; but not upon an *assignment* of a *trust*." It must be observed, that Jenkins was speaking of the *trust* of a *term for years*.

In the case of Sir Moyle Finche^b it was resolved by all the justices, "that a *trust* could not be *assigned*, because it was a matter in privity, and was in nature of a chose in action, for *cestuique trust* had no power of the land, but only to seek remedy by *subpœna*, and not like to *cestuique use*, for thereof there should be *possessio fratris*, and he should be sworn on juries in respect of the use, and he had power over the land by the statute of 1 Rich. 3." Here then the

^a Crompton, 66. a. See in favour of a cestuique trust of a term.
also Rooke v. Staples, Cary's Rep. 76. 21 & 22 Eliz.
where there was a decrec ^b 4 Inst. 85.

distinction contended for is acknowledged by all the judges, and afterwards by the chancellor; and it is observable, that sir Edward Coke, as an instance of the *trust* just described, cites the above-mentioned case from *Dyer*.

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Gilbert, in his *Law of Uses*,^c is of opinion, that if A. had assigned over the *land* itself in the case taken from *Dyer*, it would have been good by 1 R. 3.; but the words he used were not sufficient to pass the land itself, for he had no *interest* therein. But of this notion it is sufficient to observe, that it is not only directly contrary to the authorities before quoted, and to the reason of the thing, but would, if adopted, subvert the established practice of the profession. Besides, there is an evident absurdity in the distinction between the grant of the *land* itself and of an *interest* therein; for it is clear, that the statute 1 R. 3. gave *cestuique use* an *interest* in the land; and therefore if *cestuique trust* of a term had been considered as a *cestuique use* under that statute, the grant of his *interest* would have been as operative, as the grant of the *land* itself, for the purpose of passing the legal estate in the term^d.

^c Gilb. Uses, 199.^d Vide Co. Litt. 345. b.
3 Co. 24. a.

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In a late case^c where there was an outstanding satisfied term of years (and consequently attendant upon the inheritance), it was argued, that this term was within the stat. Rich 3.; and that the legal interest therein passed by a conveyance of the inheritance. But it was unanimously held, that the statute Rich.3. was not applicable to that case.

A case lately came before the courts of law, the decision of which has created some interest in the profession^b. John Dormer, lord of the manor of Mear, by indenture dated the 3d of December 1743, demised to Charles Fennell a messuage, &c. part of the lord's waste, for ninety-nine years, under the yearly rent of two shillings and sixpence. The lease, by mesne assignments, became vested in James Moody, who, by indenture dated the 1st of March 1815, assigned the residue of the term of ninety-nine years to John Nash, subject to the yearly rent of two shillings and sixpence, in trust nevertheless to attend the uses limited by a feoffment bearing date the 16th of the then instant March, *and made* between James Moody, &c. By indenture of feoffment perfected by livery of seisin, dated the 16th day of March 1815, James Moody enfeoffed J. Jaques to uses therein limited for

^c Goodtitle dem. Jones v. Jones, 7 Term Rep. 47.

^b Doe dem. Lord Dormer,

v. Moody and others, Michaelmas Term, 57 Geo. 3.

the benefit of James Moody, his appointees, heirs, and assigns, of the said messuage, &c. and covenanted to levy a fine to the same uses. The fine was levied, and the rent of two shillings and sixpence was continued to be regularly paid. In consequence of these transactions, the reversioner brought his ejectment for recovery of the possession by reason of a forfeiture, supposed to have been committed by the feoffment. The cause was tried before Thompson, chief baron, on the 29th of July 1817.

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It will be observed, that in the trusts declared concerning the term, reference is made to the feoffment *made* (i. e. already made) in trust for James Moody and his heirs. The chief baron, in summing up to the jury, put it on the ground of fraud; and after the defendant's counsel had asked the judge to save the point, which was refused, the chief baron directed the jury to find a verdict for the plaintiff, thinking, that the defendants were estopped by the deed from saying, that the assignment was before the feoffment; because the assignment refers to the feoffment as existing; "as made."

Upon a motion for a new trial, a rule to shew cause was granted; a new trial was ultimately refused by the court of king's bench; but I am not accurately informed upon what ground.

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It does not appear, that the case turned on the statute Rich. 3. It was determined either on the ground of the estoppel, or on the effect of fraud arising from the payment of the rent before and after the feoffment; and if on the ground of fraud, the fraud had the effect of avoiding the deed, as completely as a deed might have been avoided under a plea of *non est factum*.

It will not be readily admitted, that the assignment was considered absolutely void on account of fraud; for, although Lord Kenyon, in the case of *Doe dem. Willis v. Martin*, 4 Term Rep. 39. observing on the facts in that case, which arose upon the execution of a power by *deed*, says, “this then
“was gross, rank fraud, and contaminates
“the whole transaction, and renders it abso-
“lutely void in a *court of law*, as well as in
“a *court of equity*;” yet it would not be easy to discover the grossness of fraud in the case under consideration. A person not incapacitated, having a term of years, may lawfully assign it, and I know of no restriction against his subsequently making a feoffment of the same land; and if the operation of the assignment and the feoffment were to bar the reversioner after the end of the term, in consequence of his negligence in not pursuing his remedy within due time, I see no more fraud, morally speaking, in the transaction,

than in a person taking advantage of the statute of limitations, or of non-claim on a fine. But in the case in question the lessee either continued to pay rent, or he did not. In the former case, the feoffment and fine would be inoperative as between the lessor and lessee without disturbing the term; and in the latter, the lessor would suffer the injury by his own negligence.

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In all cases of this kind, no fraud is intended against the person in reversion. It is a mere contrivance to convert, during the term, the tenure or nature of the property into an estate of freehold, as between the termor, and those claiming under him, either for the purpose of family arrangements, or for qualifications, which an estate of freehold may confer. The practice of creating a freehold by disseisin in the way above mentioned, and of preserving the term, is of the most ancient date, and it never had been, to my knowledge, questioned before the case, which I have stated. It would be dangerous to refine upon these notions of supposed fraud, because, by introducing variations in the system, the law would become inconsistent with itself, and hazardous in its application.

If A. B. having acquired an estate wrongfully, with positive notice of the right of C. D. to it, levies a fine with the avowed intention

SECT. VI. of destroying C. D.'s right by non-claim on
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 stat. 1 Rich. 3. the fine, it would be difficult to conceive a
 case of a more direct moral fraud; and yet
 I have never heard, that such a fine has been
 considered void by reason of the fraud.

It has been suggested, that by assigning the term to a trustee for the disseisor, the lessee acknowledges by way of attornment the reversion to be in a stranger, which, according to sir Edward Coke (Co. Litt. 252. a.), is an act of forfeiture; but the statute 11 Geo. 2. c. 19. s. 11. makes attornments to strangers absolutely void; and sir Edward Coke, in the place above-mentioned, expressly states, that "an attornment *in pais* "worketh no forfeiture."

But to resume the subject, the judges in the above case (*Goodtitle v. Jones*) seem to consider the statute 1 Rich. 3. as applicable to certain cases, which may now occur. The words of Mr. justice Lawrence are, "With regard to the statute 1 Rich. 3. it does not seem to me to be applicable to this case. The legislature, in passing that act, only intended, that where a person, having an estate in possession, conveyed it to a trustee to his own use, and afterwards conveyed it to a purchaser, he should not set up the estate in the cestuique trust (*trustee*) against the purchaser: that is, that he should not

“ take advantage of his own fraud, and say, SECT. VI.
 “ that the conveyance to the purchaser was The operation and effect of the
 “ defective on account of the legal estate stat. 1 Rich. 3.
 “ not being in him, but being in his trustee.”

In *Blake v. Foster*^a, Mr. justice Lawrence also observed, that although the statute 1 Rich. 3. did not apply to the case of *Goodtitle v. Jones*, before mentioned, “ on further consideration the court were of opinion, “ that it extended to other cases.”

I have not, upon the most attentive consideration, been able to discover any case, to which the statute 1 Rich. 3. is now applicable.

Previously to the statute of uses, property was divided into use and possession ; and in all cases where both the use and possession were united in one person, he was complete owner of the legal and beneficial interest, to which united interests the statute of 1 Rich. 3. could not by any means extend. Since the statute of uses, 27 Hen. 8. if an estate be conveyed to A. and his heirs, to the use of B. and his heirs, in trust for C. and his heirs, the possession or legal estate is vested by virtue of the statute in B. : but the use limited to B. was the use to which the statute of 1 Rich. 3. applied ; and the statute of uses, by convert-

^a Term Rep. 487. 494.

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ing the use into a legal estate, has virtually deprived the statute 1 Rich. 3. of the interest, upon which it operated^a. The trust declared for C. was an interest unknown before the statute of uses.

The same observation will apply to the case of a conveyance unto, "*and to the use of,*" B. and his heirs, in trust for C. and his heirs: for, although in this case the legal estate is not vested in B. by virtue of the statute of uses, the use to which the statute 1 Rich. 3. applied, is limited to B.; and by the union of the use and possession in him, he has every legal and beneficial interest known before the statute of 1 Rich. 3. That statute cannot fairly be applied to a fiduciary interest, created subsequently to it, in consequence of the constructive operation of the statute 27 H. 8.

The remaining case, to be considered, is the special trust before noticed. A conveyance is made to A. and his heirs, without any express declaration of the use, upon trust, or to the intent, that he shall convey to B.; or to the intent, that he shall be a tenant to the præcipe for suffering a common recovery; or to the intent, that he shall reconvey to the

^a This point is properly suggested by Mr. Sugden in his edition to Gilb. Law of Uses and Trusts, 67. to whose note I must beg to refer.

grantor. In all these cases, a seisin is transferred to B. by the course of the common law ; and as the special trust or intent must necessarily prevent the use from resulting to the grantor, the grantee must have a complete legal estate without the aid of, and unaffected by, the statute of uses 27 H. 8. That statute uses the word *trust*, as well as *use*, and assisted by the former word, it may extend to beneficial interests, not within the statute 1 Rich. 3.; as for instance, to the trust declared upon the estate of tenant for life ; and as it is conceived, to the use or trust declared upon the seisin of tenant in tail. But there is no ground to contend, that the stat. 1 Rich. 3. which adopts the word “*use*” only, can extend to any fiduciary interest not executed at this time by the statute of uses : that the word *use* in the statute 1 Rich. 3. should have a more extensive operation, than in the statute 27 Hen. 8.

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The practical consequences, would be extremely injurious, if special trusts of this kind were considered within the stat. 1 Rich. 3. Thus, if a tenant in tail conveyed for the purpose of making a tenant to the præcipe for suffering a recovery, which recovery when suffered should enure to the use of himself in fee ; he might, by inadvertently conveying the freehold previous to suffering the reco-

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very, render such recovery inoperative. Other cases might be produced of a similar nature.

It remains to be observed, that by the statute of 50 Ed. 3. c. 6. the special trust there noticed, was subject to an execution by a creditor of the cestuique trust; but the estate of cestuique use was not extendible till the 19 H. 7. c. 15. From this it appears, that the legislature did not consider the use and special trust to be the same.

Of the aliena-
tion of cestui-
que use in re-
mainder, &c.

(3.) Perkins says^f, “ If cestuique use be “ of a reversion, he may grant the same as “ well as if he were in possession, and that “ by the statute of Richard 3. made in the “ first year of his reign, *cap.* 1.” But Perkins, in this instance, cites no authority in support of his assertion, and he is clearly wrong. His position is contradicted by the determination in Delamer’s case^g, in which it was decided, that the statute only intended to give the *present* possessor of the use a power of alienation, and did not extend to those in remainder or reversion^h. Upon the same

^f Perk. s. 98. Perkins is also wrong (as the authorities before cited prove), when he asserts, that tenant in tail, for life, or for years, could stand seised to an express use before

the statute 27 Hen. 8. See Perk. 537.

^g Plowd. 348. 350. 1 Co. 128. a. b.

^h Bro. Feof. al. Uses pl. 44. B. N. C. 75.

principle, the statute did not extend to cestuique use, who had only a naked right to the use, the establishment of which depended upon the entry of his feoffeesⁱ. But if the feoffees to uses had been disseised, and cestuique use had released to the disseisor; or if the disseisor had enfeoffed cestuique use, who had enfeoffed a stranger: in either case, the entry of the feoffees was barred^k.

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(4.) Cestuique use, by this statute, might have made a lease for years, rendering rent, for which he might have brought his action, but could not have avowed^l: and a reservation of rent by cestuique use, would have carried it to the heir, although not particularly named for that purpose^m. But notwithstanding cestuique use was enabled to make a lease for life or years, the reversion was still in the feoffees, who might have brought an action notwithstanding the want of privacyⁿ.

Of leases by cestuique use in fee.

(5.) Cestuique use could not *devise* the lands by the equity of 1 Richard 3^o. This con-

Of devises by cestuique use.

ⁱ Plowd. 351. Gilb. Uses, 27, 28.

^k Plowd. 351, 352.

^l 27 Hen. 8. 13. Bro. Feof. al. Uses, pl. 6.

^m Ibid. pl. 18.

ⁿ Year Book 5 Hen. 7. 5. b. See the Year Book 27 Hen. 8. 13. b. "If

" *cestuique use* in fee make
" a gift in tail, of whom
" shall the tenant in tail
" hold? *Deinshil.* Comm
" me semble de nulluy.
" *Fitzh.* Bien dit, par ma
" foi, il est cler q'il tient de
" les feoffees."
° Dy. 74. a. 143. a.

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and effect of the
stat. 1 Rich. 3.

struction was adopted for obvious reasons. Although the statute established the legal conveyances of cestuique use, neither the words, nor the equity of it enabled him to convey the possession of his trustees by an instrument at that time, not applicable to the transfer of real property: for lands before the statute 32 Hen. 8. were not devisable.

Where cestui-
que use was al-
so the lord or
grantee of a rent-
charge.

(6.) It was also said, that if a lord, or a grantee of a rent-charge, had been also cestuique use of the *land*, and after the statute of 1 R. 3. cestuique use had made a feoffment in fee; although the land passed from the feoffees, and his feoffment was warranted by the statute, yet the seignory or rent-charge was extinguished°. And further, it was determined, that the land of cestuique use was bound by his statute merchant, statute staple, and by elegit, by the statute 1 Rich. 3^p.

SECT. VII.

The history of
uses continued
to 23 Hen. 8.

VII. But to proceed in the historical account of uses: Richard the third, when duke of Gloucester, had frequently been made feoffee to uses. Now as the king could not be seised to a use, upon the assumption of the crown, Richard would have held the lands discharged of the uses. Therefore, as Sir

° Co. Litt. 52. a. Gilb.
Uses, 31.

^p Year Book 7 Hen. 7.

6. Bro. Feof. al. Uses, pl.
25.

William Blackstone observes^q, to obviate so notorious an injustice, an act of parliament^r was immediately passed, which ordained, that where he had been so enfeoffed, jointly with other persons, the land should vest in the other feoffees, as if he had not been named; and that where he stood solely enfeoffed, the estate itself should vest in cestuique use, in like manner as he had the use.

SECT. VII.

The history of
uses continued
to 23 Hen. 8.

The first act of parliament, which passed in the succeeding king's reign, related to uses^c. The statute 1 Hen. 7. made a *formedon* maintainable against the pernors of the profits of land enfeoffed to uses. It also allowed the tenant in the same action to have

^q 2 Com. 332.

^r 1 Rich. 1. c. 5. Those lands, whereof the king was enfeoffed jointly with others to the use of the feoffor, shall be in his co-feoffees.

^c "First, that where divers of the king's subjects having cause of action by formedon in the descender, or else in the remainder, by force of any tail for lands and tenements, be defrauded and delayed of their said actions, and oftentimes without remedy, because of feoffments made of the same lands and tenements to persons unknown, to the intent that the demandant should not know, against whom they

"shall take their actions;
"it is ordained, that the demandant in every such case have his action against the pernor or pernors of the lands, &c. demanded, whereof any person or persons had been enfeoffed to his or their use; and the same pernor or pernors named as tenant or tenants in the said action, have the same vouchers, and their lien thereupon, aid prayer, and all other advantages, as the same pernor or pernors should have had, if they were tenants indeed, or as their feoffees should have had, if the same action had been conceived against them," &c.

SECT. VII. *aid prayer, voucher, age, and other advantages.*

The history of
uses continued
to 23 Hen. 8.

This statute, which gave a formedon only by express name against *cestuique use*, was construed to extend to a *scire facias* to execute an estate tail in remainder by equity^d. But in the construction of this act, it was held in a case^e, where a *scire facias* was brought against the pignor of the profits, that the pignor should not vouch; for it should be intended in such action, in which he might vouch: and that the words of the act did not alter the law of vouchers, and give to the pignor any new voucher.

Among the inconveniences, which attended the introduction of uses, it was found, that lords lost the benefit of wardship; and, therefore, by a statute 4 Hen. 7. c. 17. the statute of Marlbridge was confirmed; and it was also provided, that the heir of *cestuique use* of lands held by knight service, being within age, should be in ward; and being of full age, should pay relief. On the contrary for the benefit of the heir of *cestuique use*, the same statute provided, that he should have an action against his guardian committing waste.

^d 1 Co. 131. b.

^e 11 Co. 62. b.

By the 19th Hen. 7. c. 15. the lands of cestuique use were made subject to execution for his debt, by judgment, recognizance, statute merchant, and of the staple. The lands of cestuique use holden *in socage*, were also made liable to satisfy the lord his relief, heriot, and other duties. Cestuique use also was allowed to have the same advantages he might have had, if he had been tenant of the land. And, lastly, the lands of cestuique use, being a bondman, were made seizable by the lord.

SECT. VII.

The history of
uses continued
to 23 Hen. 8.

VIII. We have seen, that by the statute of 15 Rich. 2. c. 5. lands conveyed to the use of religious houses, or bodies corporate, were amortized by license from the crown. But that statute did not extend to conveyances in trust for parish churches, chapels, churchwardens, companies, fraternities, &c. erected by *common assent*, and not being bodies corporate. Now these alienations were as prejudicial to the lords, as alienations in mortmain: for they thereby lost their wards, heriots, reliefs^a, &c. To remedy this mischief the statute of 23 Hen. 8. c. 10. was made. It recites, “That by reason of feoffments made of trust of manors, &c. to the use of parish churches, chapels, churchwardens, guilds, fraternities, commonalties,

SECT. VIII.

Of the statute
23 Hen. 8. and
the construction
thereof.

^a 1 Co. 23. b.

SECT. VIII. "companies, or brotherhoods, erected or
Of the statute
 25 Hen. 8. and
 the construction
 thereof. "made of devotion, or *by common assent* of
 "the people, *without any corporation*, and to
 "the uses and intents to have obits perpetual,
 "or any continual service of a priest for ever,
 "&c. or to any other like uses and intents,
 "there groweth to the king our sovereign
 "lord, and to other lords and subjects of the
 "realm, the same like losses and inconve-
 "niences, and is as much prejudicial to them,
 "as doth and is in case where lands are alien-
 "ed in mortmain: be it therefore enacted,
 "That all and every such uses, intents, and
 "purposes, of what name, nature, or quality
 "the same shall be called, &c. shall be ut-
 "terly void; and if any person, in default of
 "this statute, do bind their heirs, &c. that
 "then every such pain, penalty, craft, co-
 "lour, and every other thing, &c. shall be
 "utterly void: and that this statute shall be
 "always interpreted, &c. most beneficially to
 "the destruction of such uses, &c. and of
 "all other like uses and intents."

I shall make a few observations on this statute.—In the first place, it was made to prevent conveyances of land, &c. in trust for superstitious purposes, such as to pray for souls supposed to be in purgatory; but it was not intended to prevent alienations in trust for good and charitable purposes; such as finding of a preacher, maintenance

of a school, relief and comfort of maimed soldiers, sustenance of poor people, reparation of churches, highways, bridges, causeways, discharging of poor inhabitants of a town of common charges, for making of a stock for poor labourers in husbandry, and poor apprentices, and for the marriage of poor virgins, and other like charitable uses ; for, as it has been properly observed, “no time has been so barbarous as to abolish learning and knowledge, nor so uncharitable as to prohibit relieving the poor^c.”

SECT. VIII.
Of the statute
23 Hen. 8. and
the construction
thereof.

2dly. This act did not make the conveyance itself, void, nor did it give the lord any title to enter for mortmain (like the 15 Richard 2. c. 5.): but it made the use void. Therefore if the feoffment had been within this statute, the feoffees (if no consideration had been expressed) would have stood seised, notwithstanding the declaration of uses, to the use of the feoffor and his heirs ; but if there had been a consideration, though merely nominal, the use would have vested in the feoffees^d.

IX. I have now noticed all the statutes, which I am aware of, relating to uses, previously to the statute of 27 Hen. 8. c. 10.

SECT. IX.

The requisites to
be observed in
raising uses.

^c 1 Co. 24. a. 26. a. torney General v. Whor-

^d 1 Co. 24. a. See At-wood, 1 Ves. 536.

SECT. IX. These statutes all tend to consider *cestuique* use as the real owner of the land ; and indeed he was made completely so by the statute 27 Hen. 8. c. 10. But it will be necessary, in this place, to consider the learning of uses before that statute was enacted. Uses had undergone many refinements ; and although several acts were passed to prevent the injustice, which these refinements produced, yet none of them were found effectual to remedy the evil.

The requisites
to be observed
in raising uses.

I shall now consider the requisites to be observed in raising uses.

A person capable of standing
seised to a use.

(1.) There should have been a person or persons capable of standing seised to a use. Generally every common person not incapacitated to take, by way of grant, could stand seised to a use : and, therefore, a feme covert, or an infant, might have stood seised to a use^a.

A use was before described to be a trust or confidence, which was not issuing out of land, but as a thing collateral, annexed *in privacy to the estate*, and to the *person* touching the land. It follows from this explanation of a use, that whenever the legal estate vested in a person, in whom the *confidence of person*, or

^a Ba. Uses, 58. Bro. Feof. al. Uses, p. 51. Shep. T. 516.

privity of estate failed, the use was either destroyed, or for a time suspended.

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Therefore, a lord by escheat, or of a villein, could not stand seised to a use; because the title of the lord accrued to him either by reason of the seignory of the land, or of the villein; which title was higher than the use, or confidence, and therefore could not be subject to it. And the same rule applied to a lord, who entered for mortmain, or who recovered by a cessavit, &c.; for his title was paramount to the use^b.

As to privity of
estate.

Tenant by the curtesy could not stand seised to a use; for he was *in* by the act of law in consideration of marriage, and was not *in* in privity of estate^c. And it seems, by the better opinion, that a tenant in dower could not stand seised to a use^d; and that for the same reason. This point, however, has been doubted by Gilbert, though he seems to acquiesce in it in another place^e. So neither could a disseisor, abator, nor intruder stand seised to a use, although he had notice^f. So if a feoffee to uses had bound himself in a statute, &c. and the conuzee had taken out

^b 1 Co. 122. a. 139. b. B. N. C. 60.

and the cases collected in the notes to pl. 15. 16.

^c 1 Co. 122. a.

^e Gilb. Uses, 11. 171.

^d Ibid. See 22 Vin. 184.

^f 1 Co. 122. a. 139. b.

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to be observed
in raising uses.

Confidence of
person.

execution thereupon, he would have held the land discharged of the uses^g.

Although there had been *privity* of estate, yet if *confidence*, either expressed, or implied, failed in the person, the use was destroyed, or suspended. Thus, if a feoffee to uses had for a valuable consideration enfeoffed another, who had no notice of the former uses, there was privity of estate, but no confidence in the person of the second feoffee; and consequently the use was gone^h. If the feoffment had been made without consideration to a person, who had no noticeⁱ; or upon a valuable consideration to one, who had notice^k; in each case the privity of estate, and confidence in the person, were preserved; and the feoffee took the estate subject to the former uses.

If there had been tenant for life, remainder in fee to the use of another, and the tenant for life had made a feoffment to one, who had notice; the feoffee could not have stood seised to the former use; for that use was annexed to one estate, and he was *in* of another^l.

^g Bro. Feof. al. Uses, pl. 10.

^h 1 Co. 122. b. Abbot of Bury v. Bokenham, Dy. 8. 33 Hen. 6. 16.

ⁱ 1 Co. 122. b.

^k Plowd. 351. Year Book

5 Ed. 4. 7.

^l 1 Co. 122. b.

The king could not stand seised to a use ; SECT. IX.
 and therefore if lands had been conveyed to the king and a subject, *pour term de leur vies*, The requisites to be observed in raising uses.
 to certain uses, such uses were void as to a moiety of the lands^m. Neither could the queen be a feoffee to usesⁿ.

A corporation, abbé, mayor, commonalty, and persons attainted^o, were under the like disability. So in a case, where an alien and another person were enfeoffed to uses, the crown became entitled to a moiety of the land discharged of the uses^p.

I have already stated the grounds and authorities, upon which I conclude, that neither tenant in tail, for life, nor years, could stand seised to a *use*. It must be added, that an occupant could not stand seised to a use^q.

(2.) There should have been a person capable of receiving or taking the use. A person capable of receiving or taking the use.

^m Year Book 7 Ed. 4. 17. Ba. Uses, 56, 57. Berkeley's case. Plowd. 238. (e). See the cases collected in notes to pl. 4. in 22 Vin. 182.

ⁿ Bac. Uses, 57.

^o B. N. C. 60. Bro. Feof. al. Uses, 40. 1 Co. 122. a. Ba. Uses, 57, 58, 59. Dy. 8. b. See Halfpenny's case, Year Book 14 Hen. 8. 8. a.

22 Vin. 182, 183. and the several cases collected in note to pl. 6. as to a corporation.

^p King v. Boys, Dy. 283. b. See cases collected in note to pl. 18. in 22 Vin. 184.

^q Bro. Feof. al. Uses, pl. 10. 22 Vin. 183. pl. 7. The case in Hard. 468. was a *trust*, and not a *use*.

SECT. IX.^a

The requisites
to be observed
in raising uses.

As to this point it may be observed, that all persons capable of taking a conveyance of the lands, might have taken the same estate by way of use; therefore the limitation of a use to a corporation was good, if a license for that purpose had been obtained^r. So the king could have been cestuique use by matter of record; and therefore if a fine had been levied, or recovery suffered, and the use declared to the king by deed inrolled, the king would have been entitled^r as cestuique use, though he was not a party to the declaration^r. But it was necessary, that both the declaration and conveyance should be matter of record.

The limitation of a use to the parishioners of any particular place was void^s.

Whether an alien could have been cestuique use was an undetermined point; some holding, that a use, being merely in conscience, equity might have directed the execution of it for the benefit of the alien^t; whilst others contended, that an alien could not have compelled the feoffees to execute the use; it being contrary to the policy of the law of

^r Shep. T. 509.

^r Bac. Uses, 60.

^s Year Book 13 Hen. 7.
9. b. Bro. Feof. al. Uses,
29. Shep. T. 509. See 22
Vin. 247. (E. a.)

^t 12 Hen. 7. 28. a. Bro.
Feof. al. Uses, pl. 29. Al-
len, 14. Vide Preamble to
the Stat. 27 Hen. 8. c. 10.

the kingdom, that an alien should plead or be impleaded touching lands in any of our courts^u.

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The requisites
to be observed
in raising uses.

(3.) There should have been either a consideration to raise, or a declaration of, the use. Indeed, where an express declaration of the use was made on the feoffment, a pecuniary consideration, or the want of it, could not vary the use so declared^w. Therefore, if A. had delivered money to J. S. for the purpose of purchasing lands for him, and J. S. had purchased them *to his own use*, no use could have resulted to, or be implied in, A^x. So if A. in consideration of 100*l.* paid to him by B. had enfeoffed B. and C.; the declaration of the use to B. and C. would have been good, notwithstanding the payment of the money by B. only^y.

A consideration
or declaration of
the use.

When no declaration of the use was made, the consideration paid by the feoffee or grantee created a use for him. If neither a consideration had been paid or reserved, nor a declaration made, the use would have resulted to the grantor^z, and he would have been *in*

^u Gilb. Uses, 43. Allen, 15, 16. Styles, 40. Ba. Uses, 43. See 22 Vin. 247. and cases collected in note to pl. 1. See post, whether an alien may be cestuique trust at this day.

^w Perk. s. 537. See

Calthorp's case, Moor, 102. 1 Co. 176. b.

^x Bro. Feof. al. Uses, 40. See *infra*, chap. 3. as to trusts.

^y Same's case, 2 Roll. Ab. 791.

^z Perk. 533.

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to be observed
in raising uses.

as of the old use. It was therefore determined, that if a man, *seised ex parte maternâ*, had made a feoffment, levied a fine, or suffered a recovery without having declared the use, and without consideration, the use would have resulted to him and his heirs on the part of his mother^a. This observation will apply to the conveyance by lease and release, as I shall endeavour hereafter to explain. So if there had been two joint tenants, the one in fee, and the other for life, and they had levied a fine without having declared the use, it would have resulted to them according to their estates or interests in the land^b. In like manner, if A. seised in fee of an estate, had joined with B. in levying a fine, without a declaration of the use, it would have resulted to A. *only*, and his heirs^c.

It should seem, that any pecuniary consideration, however trifling it might have been, or any rent reserved, however inconsiderable, would have been sufficient to raise the use to the feoffee, conuzee, or recoveror^d.

The above remarks applied only to conveyances *in fee*. The conveyance or creation

^a 1 Co. 100. b. Har. Co. Litt. 12. b. N. 2. 2 Salk. 591. 3 Lev. 406. 2 Roll. Ab. 780. 2 P. W. 139. See 22 Vin. 184. pl. 4, 5. and the cases collected in the notes.

^b Beckwith's case, 2 Co. 58. a.

^c Ibid.

^d Porter's case, 1 Co. 24. a. 2 Roll. Ab. 787, 788.

of estates *tail*, for *life*, or *years*, (so far as related to the doctrine of uses), depended upon different principles^e.

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The requisites to be observed in raising uses.

In respect of grants of *incorporeal* property, it must be noticed, that if a man seised of a rent-charge in fee, had made a conveyance of it, without having declared the use, and without any consideration, the grantee would have stood seised to the use of the grantor and his heirs^f. But if the proprietor of lands had granted a rent-charge thereout unto a stranger, the law would not presume, that such grant was intended for the grantor's use, though no use had been declared, nor consideration paid^g; and upon a conveyance of a seignory or rent in tail, for life, or for years, without declaration of the use, and without consideration, the grantee would have been seised to his own use^h.

(4.) There should have been a sufficient substance or hereditament, out of which the use might have arisen. Thus, all local inheritances, as lands, houses, rents in esse, reversions, remainders, liberties, and franchises, might have been conveyed to uses. But it was different as to personal inheritances, such as annuities. So, it was said,

A substance or hereditament.

^e See ante 30. et seq.

^f Perk. s. 530.

^g Ibid. 531.

^h Ibid. 537.

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The requisites
to be observed
in raising uses.

that uses could not have been raised out of such things, *quæ ipso usu consumuntur*, as commons, ways in gross, or authorities granted to a man and his heirs to hunt in a park, chase, or forestⁱ.

SECT. X.

The properties
of a use.

X. I shall now examine the properties of the use.

It was descend-
ible.

(1.) It was descendible according to the rules of the common law respecting estates of inheritance^a; the courts of equity having, in this instance, adopted the maxim, *æquitas sequitur legem*. There might have been a *possessio fratris* of a use^b; though indeed lord Bacon calls this a vulgar opinion^c; observing, that it meant nothing more, than that the chancellor would consult with the rules of law, where the intention of the parties did not specially appear. The rule, however, was certainly established in chancery.

ⁱ Wm. Jones, 127.

^a 2 Roll. Ab. 780. If a man holds of the king before the statute of uses, and infeoffs others to his own use during his life, with remainder over in tail, remainder to his right heirs, and dies: the reversion *descends* to the *heir*, Bro. Livery, pl. 61. So if the ultimate limitation of the use was to the grantor's right

heirs, although no express particular use was limited to him. Sir John Hussey's case, Bro. Nosme, pl. 1. 40. March. N. C. 87. Dyer, 133. pl. 6. See post, ch: 2. s. 5. (2.)

^b Year Book 5 Ed 4. 7. b. 1 Co. 88. a. 121. b. 4 Co. 22, a. Co. Litt. 19. b. Dy. 10, 11. Plowd. 58.

^c Bac. Uses, 11.

So the use of lands held in borough English would have descended to the youngest son, and that of gavelkind to all the sons^d; and where there was a custom of a manor, that the lands should descend to the eldest daughter, in default of sons, it was determined, that the use should descend in like manner^e.

SECT. X.

The properties of a use.

(2.) The use was devisable before the statute of wills. After the conquest a devise could not operate upon the lands; because, by the common law the ceremony of livery of seisin was necessary to the transfer of them; and because it was contrary to the nature of a feud, that the feudatory should dispose of it by will. But the courts of equity, under the colour of allowing a devise of the use, did in effect permit the legal interest in the lands to be devised^f. An infant however was disabled from devising the use^g.

(3.) As cestuique use might have devised, so he might have aliened or transferred the use^h; and by the statute 1 Rich. 3. he might have conveyed the legal estate. But it is ob-

It was alienable.

^d 2 Roll. Ab. 780. 1 Co. 88. a.

^e See Year Book 21 Ed. 4. 24. 2 Roll. Ab. 779.

^f 2 Roll. Ab. 780.

^h Bro. Feof. al. Uses pl.

^g See Wright's Ten. 172. 174. ed. 1768. Year Book 10 Hen. 7. 26. 27 Hen. 8. 7. 1 Co. 123. b.

44. B. N. C. 75. Plowd. 350. Bac. Uses, 16.

SECT. X. servable, that in the case of a feme covert, a fine was necessary to pass her useⁱ.
 The properties of a use.

Cestuique use had neither *jus in re*, nor *ad rem*. (4.) But cestuique use, in respect to the legal ownership of the land, had neither *jus in re*, nor *ad rem*^k. Therefore when in possession, he was considered merely as tenant by sufferance^l. He could not bring an action, avow, nor justify for damage *faisant* in his own name^m. When he made a lease pursuant to the statute 1 Rich. 3. the reversion still continued in the feoffees, who might have brought an action for waste, or have entered for a forfeitureⁿ. By force of the last-mentioned statute, he might have granted the herbage or corn, yet he could not have taken them for his own use^o. So his wife was not dowable of the use^p; and the husband of feme cestuique use could not have his curtesy^q. Cestuique use did not forfeit

ⁱ Year Book 7 Ed. 4. 14.

^k 1 Co. 121. b. W. Jones, 127. Bac. Uses, 5.

^l Year Book 15 Hen. 7. 2. 4 Ed. 4. 8. Bro. Feof. al. Uses, 39. Plowd. 3. a. (Basset v. Manxell.) See 22 Vin. 286. pl. 2, 3. and the cases collected in the note to pl. 3. It should seem from Hard. 461. that he was considered as tenant *at will*, and might therefore have taken a *release*; and this seems to be the true construction. See Litt. s.

462. 463. In Doe v. Pott, Doug. 710. the estate of a mortgagor was considered as a tenancy at will, and as such capable of receiving a surrender. But cont. Bac. 24. Sem.

^m Bro. Feof. al. Uses, pl. 39. 13. b.

ⁿ Ibid. 26. Year Book 5 Hen. 7. 5.

^o Bro. pl. 13. 5 Hen. 7. 2.

^p Perk. s. 349.

^q Ibid. 463. 1 Co. 123. b.

his lands for treason nor felony^r; and the use was not considered as assets in the hands of the heir, nor executor, to satisfy creditors^s. SECT. X.
The properties of a use.

The several statutes before enumerated, and the preamble of the statute 27 Hen. 8. c. 10. point out other inconveniences attending the above principle, that cestuique use had no legal right nor title to the lands.

(5.) Cestuique use, indeed, might have been sworn upon an inquest^t: but this rule was established under particular circumstances; for, as sir Edward Coke observes, at the time of making the statute 2 Hen. 5. c. 3. the greater part of the lands in the kingdom was held in use; an event occasioned by the unhappy controversy between the houses of York and Lancaster. Now that statute was made to remedy a mischief, which happened from the sheriffs having frequently returned men of no understanding^u, and it therefore provides, that he should return proper men. The courts, therefore, for the advancement and expedition of justice, extended it (against the letter) to the cestuique use of lands, and not to his feoffees. Cestuique use might have been sworn upon an inquest.

^r Jenk. Cent. 190.
Year Book 5 Ed. 4. pl. 18.

^t Co. Litt. 272. a.

^u See Year Book 15 Hen. 7. 13.

^s 1 Co. 121. b.

SECT. X.

The properties
of a use.

The feoffee was
complete owner.

(6.) As to the feoffee, he was complete owner of the land at law. He performed the feudal duties^w; his wife had dower^x; and his estate was subject to wardship, relief, &c. He had power of selling the lands, and forfeited them for treason or felony. In short, he might have brought actions, and have exercised every kind of ownership over, or in respect of, the lands^y.

Uses differed in
many instances
from cases of
possession.

(7.) We have seen, that the use did, in some instances, ensue the nature of the land; as in cases of descent, and where it had been declared, or resulted, to the grantor, or feoffor. But, uses, as Bacon observes, differ in many instances from cases of possession. Thus, by the common law, warranty could not have bound the right of a use, as it would have done the right of possession^z. There was no necessity at common law for a consideration to establish a deed, nor did notice constitute covin: but it has already been explained, how materially a conveyance to uses was affected by the want of a consideration, or by notice. In the case of possession, a rent out of land, and the land itself, cannot stand together: but it was otherwise in the case of a use. To

^w See note 1. Butl. Co. Litt. 271. b.

^x Bro. Feof. al. Uses, pl. 10.

^y Dy. 9. b. Jenk. 190. and the several cases before cited.

^z Bac. Uses, 12.

the above differences, mentioned by Bacon^a,
 I may add, that the word, *heirs*, was neces-
 sary at common law to create an estate in fee-
 simple. But if a bargain and sale had been
 made before the statute of uses, the bargainee
 would have had an estate *in fee* in the use
 without the word heirs^b; because the bar-
 gainee having paid a valuable consideration,
 the courts of equity would have directed the
 use according to the intention of the parties.
 So if an estate had been limited at common
 law to a man, and to such a woman as he
 should afterwards marry, the man would have
 taken the whole^c; but the limitation of the
 use in the above manner would have been
 good^d. So if there had been a feoffment in
 fee to the use of A. for years, with remainder
 to the use of the right heirs of J. S. this
 contingent remainder would have been good;
 for the feoffees remained tenants of the free-
 hold^e.

SECT. X.

The properties
of a use.

XI. Such then was the learning, and such
 the state of uses at the time, when it was
 deemed expedient to pass the statute 27 Hen.
 8. c. 10. commonly called the statute of uses.
 They were attended, as the reader must have
 remarked, with considerable inconveniences,

The statute 27
Hen. 8. c. 10.

^a See Bac. Uses, from 11
to 18.

^c Moor. 96. pl. 240.

^b 1 Co. 100. b. Co. Litt.
9. b.

^d 1 Co. 101. a. Dy. 190.
pl. 17, 18.

^e 1 Co. 135. a.

SECT. XI. and serious mischiefs ; and they had hitherto
 The statute 27 Hen. 8. c. 10. baffled the partial attacks of the legislature.
 It was now found expedient to apply some effectual remedy to the evil ; and it is said, that Henry the eighth, being displeased at the loss of wardships, and at other injuries done to him, complained to the judges of the defect of the law in that respect ; and that they hinted to him, “ that if the possession “ might be joined to the use, all would go “ well.” This advice probably laid the foundation of the statute of uses^s.

Preamble.

The statute recites, “ Where by the com-
 “ mon laws of this realm, lands, tenements,
 “ and hereditaments be not devisable by tes-
 “ tament, nor ought to be transferred from
 “ one to another, but by solemn livery and
 “ seisin, matter of record, writing sufficient
 “ made *bonâ fide* without covin or fraud ; yet
 “ nevertheless divers and sundry imagina-
 “ tions, subtle inventions, and practices have
 “ been used, whereby the hereditaments of
 “ this realm have been conveyed from one
 “ to another by fraudulent feoffments, fines,
 “ recoveries, and other assurances, craftily
 “ made to secret uses, intents, and trusts ;
 “ and also by wills and testaments sometime
 “ made by *nude parolæ*, and words sometime
 “ by signs and tokens, and sometime by

^r 2 Leon. 17, 18.

^s The 10 Car. 1. sess. 2.

c. 1. s. 1. in Ireland, is similar to the 27 Hen. 8. c. 10.

“ writing ; and for the most part made by
“ such persons as be visited with sickness, in
“ their extreme agonies and pains, or at such
“ time as they have scantly had any good
“ memory or remembrance ; at which times
“ they being provoked by greedy and covet-
“ ous persons, lying in wait about them, do
“ many times dispose indiscreetly and unad-
“ visedly their lands and inheritances ; by
“ reason whereof, and by occasion of which
“ fraudulent feoffments, fines, recoveries, and
“ other like assurances to uses, confidences,
“ and trusts, divers and many heirs have been
“ unjustly, at sundry times, disherited, the
“ lords have lost their wards, marriages, re-
“ liefs, harriots, escheats, aids *pur fair fitz*
“ *chivalier*, & *pur file marier*, and scantly
“ any person can be certainly assured of any
“ lands by them purchased, nor know surely
“ against whom they shall use their actions,
“ or execution, for their rights, titles, and
“ duties ; also men married have lost their
“ tenancies by the courtesy, women their
“ dowers ; manifest perjuries by trial of such
“ secret wills, and uses, have been commit-
“ ted ; the king’s highness hath lost the pro-
“ fits and advantages of the lands of persons
“ attainted, and of the lands craftily put in
“ feoffments to the uses of aliens born, and
“ also the profits of waste for a year and a
“ day of lands of felons attainted, and the
“ lords their escheats thereof ; and many

SECT. XI.

The statute 27
Hen. 3. c. 10.

SECT. IX. “ other inconveniencies have happened, and
 The statute 27 “ daily do increase among the king’s subjects,
 Hen. 8. c. 10. “ to their great trouble and inquietness, and
 “ to the utter subversion of the ancient com-
 “ mon laws of this realm : for the extirpating
 “ and extinguishment of all such subtle prac-
 “ tised feoffments, fines, recoveries, abuses,
 “ and errors heretofore used and accustomed
 “ in this realm, to the subversion of the good
 “ and ancient laws of the same, and to the
 “ intent that the king’s highness, or any
 “ other his subjects of this realm, shall not
 “ in anywise hereafter, by any means or in-
 “ ventions be deceived, damaged, or hurt by
 “ reason of such trusts, uses, or confidences,
 “ it may please the king’s most royal majesty;
 “ that it may be enacted by his highness, by
 “ the assent of the lords spiritual and tem-
 “ poral, and the commons in this present par-
 “ liament assembled, and by the authority of
 “ the same, in manner and form following;
 “ that is to say, That where any person or
 “ persons stand, or be seised, or at any time
 “ hereafter shall happen to be seised, of and
 “ in any honours, castles, manors, lands, te-
 “ nements, rents, services, reversions, re-
 “ mainders, or other hereditaments, to the
 “ *use, confidence, or trust* of any *other* person
 “ or persons, or of any body politic, by rea-
 “ son of any bargain, sale, feoffment, fine,
 “ recovery, covenant, contract, agreement,
 “ will, or otherwise, by any manner of means

“ whatsoever it be; that in every such case SECT. XI.
 “ all and every such person and persons, and The statute 27
 “ bodies politic, that have, or hereafter shall Hen. 8. c. 10.
 “ have, any such use, confidence, or trust, in The possession
 “ fee simple, fee tail, for term of life, or for shall be in him
 “ years, or otherwise, or any use, confidence, or them that
 “ or trust in remainder, or reverter, shall have the use.
 “ from henceforth stand, and be seised, deem-
 “ ed, and adjudged in lawful seisin, estate,
 “ and possession, of and in the same honours,
 “ castles, manors, lands, tenements, rents,
 “ services, reversions, remainders, and here-
 “ ditaments, with their appurtenances, to all
 “ intents, constructions, and purposes in the
 “ law, of and in such-like estates, as they had
 “ or shall have in use, trust, or confidence, of
 “ or in the same; and that the estate, title,
 “ right, and possession, that was in such
 “ person or persons, that were or hereafter
 “ shall be seised of any lands, tenements, or
 “ hereditaments, to the use, confidence, or
 “ trust of any such person or persons, or of
 “ any body politic, be from henceforth clearly
 “ deemed and adjudged to be in him or them,
 “ that have or hereafter shall have such use,
 “ confidence, or trust, after such quality,
 “ manner, form, and condition, as they had
 “ before in or to the use, confidence, or trust
 “ that was in them.

2. “ That where divers and many persons S. 2. Convey-
 “ be, or hereafter shall happen to be, jointly ances made to
 “ different persons

SECT. XI. “seised of and in any lands, tenements, rents,
 The statute 27 “reversions, remainders, or other heredita-
 Hen. 8. c. 10. “ments, to the use, confidence, or trust, of
 to the use of one “any of them that be so jointly seised, that
 or some of them. “in every such case, those person or persons
 “which have or hereafter shall have any
 “such use, confidence, or trust, in any
 “such lands, tenements, rents, reversions,
 “remainders, or hereditaments, shall from
 “henceforth have, and be deemed and ad-
 “judged to have only to him or them that
 “have or hereafter shall have any such use,
 “confidence, or trust, such estate, possession,
 “and seisin of and in the same lands, tene-
 “ments, rents reversions, remainders, and
 “other hereditaments, in like nature, man-
 “ner, form, condition, and course, as he or
 “they had before in the use, confidence, or
 “trust of the same lands, tenements, or he-
 Saving of the “reditaments: saving and reserving to all
 right of stran- “and singular persons, and bodies politic,
 gers. “their heirs and successors, other than those
 “person or persons which be seised, or here-
 “after shall be seised, of any lands, tene-
 “ments, or hereditaments, to any use, con-
 “fidence, or trust, all such right, title, entry,
 “interest, possession, rents, and action, as
 “they or any of them had or might have had
 “before the making of this act.

Saving of the
 right fees to
 their own use.

3. “And also saving to all and singular
 “those persons, and to their heirs, which be

“ or hereafter shall be seised to any use, all SECT. XI.
 “ such former right, title, entry, interest, The statute 27
 “ possession, rents, customs, services, and ac- Hen. 8. c. 10.
 “ tions, as they or any of them might have
 “ had to his or their own proper use, in or to
 “ any manors, lands, tenements, rents, or
 “ hereditaments, whereof they be, or here-
 “ after shall be, seised to any other use, as if
 “ this present act had never been had nor
 “ made, any thing contained in this act to
 “ the contrary notwithstanding^b.

4. “ And where also divers persons stand
 “ and be seised of and in any lands, tene-
 “ ments, or hereditaments, in fee simple or
 “ otherwise, to the use and intent that some
 “ other person or persons shall have and per-
 “ ceive yearly to them, and to his or their
 “ heirs, one annual rent of 10*l.* or more or
 “ less, out of the same lands and tenements,
 “ and some other person one other annual
 “ rent to him and his assigns, for term of life
 “ or years, or for some other special time, ac-
 “ cording to such intent and use as hath
 “ been heretofore declared, limited, and made
 “ thereof:

5. “ Be it enacted therefore by the autho- 5 S. The exe-
 “ rity aforesaid, That in every such case, the cution of rents.

^b Upon this clause, see 245. 1 Mod. 107. See as
 Ferrers v. Fermor, Cro. to a feoffment made by a
 Jac. 648. 1 Vent. 195. lord to his copyholder to
 280. Cecil's case, 7 Co. the use of others, Ised's
 19. b. 20. a. 2 Roll. Rep. case cited 7 Co. 39.

SECT. XI. “ same persons, their heirs and assigns, that
 The statute 27 “ have such use and interest, to have and per-
 Hen. 8. c. 10. “ ceive any such annual rents, out of any
 “ lands, tenements, or hereditaments, that they
 “ and every of them, their heirs and assigns,
 “ be adjudged and deemed to be in possession
 “ and seisin of the same rent, of and in such
 “ like estate, as they had in the title, interest,
 “ or use of the said rent or profit, and as if
 “ a sufficient grant, or other lawful convey-
 “ ance, had been made and executed to them,
 “ by such as were or shall be seised^c, to the
 “ use or intent of any such rent to be had,
 “ made, or paid, according to the very trust
 “ and intent thereof; and that all and every
 “ such person and persons as have or hereafter
 “ shall have any title, use, and interest, in
 “ or to any such rent or profit, shall lawfully
 “ distrein for non-payment of the said rent,
 “ and in their own names make avowries, or
 “ by their bailiffs or servants make conisances
 “ and justifications, and have all other suits,
 “ entries, and remedies, for such rents^d, as
 “ if the same rents had been actually and
 “ really granted to them with sufficient
 “ clauses of distress, re-entry, or otherwise,
 “ according to such conditions, pains, or
 “ other things, limited and appointed upon
 “ the trust and intent for payment or surety
 “ of such rent.

^c Dyer, 362, b. pl. 21.

Bascawin and Herle v.

^d See upon this head

Cooke, 1 Mod. 223.

SECT. XI.

The statute 27
Hen. 8. c. 10.

6. “ And be it further enacted, by the au-
 “ thority aforesaid, That, whereas divers per-
 “ sons have purchased, or have estate made
 “ and conveyed of and in divers lands, tene-
 “ ments, and hereditaments, unto them and
 “ their wives, and to the heirs of the hus-
 “ band, or to the husband and to the wife,
 “ and to the heirs of their two bodies be-
 “ gotten, or to the heirs of one of their bo-
 “ dies begotten, or to the husband and to
 “ the wife for the term of their lives, or for
 “ term of life of the said wife; (2.) or where
 “ any such estate or purchase of any lands,
 “ tenements, or hereditaments, hath been, or
 “ hereafter shall be made to any husband and
 “ to his wife in manner and form expressed, or
 “ to any other person or persons, and to their
 “ heirs and assigns, to the use and behoof
 “ of the said husband and wife, or to the use
 “ of the wife as is before rehearsed, for the
 “ jointer of the wife; (3.) that then, in
 “ every such case, every woman, married,
 “ having such jointer made, or hereafter to
 “ be made, shall not claim, nor have title to
 “ have any dower of the residue of the lands,
 “ tenements, or hereditaments, that at any
 “ time were her said husband’s, by whom
 “ she hath any such jointer, nor shall de-
 “ mand or claim her dower of and against
 “ them that have the lands and inheritances
 “ of her said husband; (4.) but if she have
 “ no such jointer, then she shall be admitted

SECT. XI. “ and enabled to pursue, have and demand
 The statute 27 “ her dower by writ of dower, after the due
 Hen. 8. c. 10. “ course and order of the common laws of
 “ this realm; this act, or any law or provi-
 “ sion made to the contrary thereof, notwith-
 “ standing.

7. “ Provided alway, That, if any such
 “ woman be lawfully expelled or evicted
 “ from her said jointer, or from any part
 “ thereof, without any fraud or covin, by
 “ lawful entry, action, or by discontinuance
 “ of her husband; then every such woman
 “ shall be endowed of as much of the re-
 “ sidue of her husband’s tenements or here-
 “ ditaments, whereof she was before dowable,
 “ as the same lands and tenements, so evict-
 “ ed and expelled, shall amount or extend
 “ unto.

8. “ Provided also, That this act, nor
 “ any thing therein contained or expressed,
 “ extend, or be in any wise hurtful or preju-
 “ dicial to any woman or women heretofore
 “ being married, of, for, or concerning such
 “ right, title, use, interest, or possession, as
 “ they or any of them have claim, or pretend
 “ to have for her or their jointer or dower of,
 “ in, or to any manors, lands, tenements, or
 “ other hereditaments of any of their late hus-
 “ bands, being now dead or deceased, any

“ thing contained in this act to the contrary SECT. XI.

“ notwithstanding. The statute 27
Hen. 8. c. 10.

9. “ Provided also, That if any wife
“ have, or hereafter shall have any manors,
“ lands, tenements, or hereditaments, unto
“ her, given and assured after marriage, for
“ term of her life, or otherwise in jointer, ex-
“ cept the same assurance be to her made by
“ act of Parliament, and the said wife after
“ that fortune to outlive her said husband,
“ in whose time said jointer was made or as-
“ sured unto her, that then the same wife
“ so overliving, shall and may at her liberty
“ after the death of her said husband, refuse
“ to have and take the lands and tenements
“ so to her given, appointed, or assured du-
“ ring the coverture, for term of her life or
“ otherwise in jointer, except the same as-
“ surance be to her made by act of Parlia-
“ ment, as is aforesaid; (2.) and, thereupon
“ to have, ask, demand, and take her dower
“ by writ of dower or otherwise, according
“ to the common law, of and in all such
“ lands, tenements, and hereditaments as her
“ husband was, and stood seised of any
“ state of inheritance at any time during the
“ coverture, any thing contained in this act
“ to the contrary thereof notwithstanding.

10. “ Provided also, That this present
“ act, or any thing herein contained, extend,

SECT. XI. “ nor be at any time hereafter interpreted,
 The statute 27 “ expounded, or taken, to extinct, release,
 Hen. 8. c. 10. “ discharge, or suspend any statute, recog-
 “ nizance, or other bond by the execution of
 “ any estate of or in any lands, tenements, or
 “ hereditaments, by the authority of this act,
 “ to any person or persons, or bodies politic;
 “ any thing contained in this act to the con-
 “ trary thereof notwithstanding.

11. “ And forasmuch as great ambiguities
 “ and doubts may arise of the validity, and
 “ invalidity of wills heretofore made of any
 “ lands, tenements, and hereditaments, to
 “ the great trouble of the king’s subjects:
 “ (2.) the king’s most royal majesty, mind-
 “ ing the tranquillity and rest of his loving
 “ subjects, of his most excellent and accus-
 “ tomed goodness, is pleased and contented
 “ that it be enacted by the authority of this
 “ present Parliament, that all manner true
 “ and just wills and testaments heretofore
 “ made by any person or persons deceased,
 “ or that shall decease before the first day of
 “ May that shall be in the year of our Lord
 “ God 1536, of any lands, tenements, or
 “ other hereditaments, shall be taken and
 “ accepted good and effectual in the law,
 “ after such fashion, manner, and form as
 “ they were commonly taken and used at any
 “ time within forty years next afore the
 “ making of this act; any thing contained

“ in this act, or in the preamble thereof, or
 “ any opinion of the common law to the con-
 “ trary thereof, notwithstanding.

SECT. XI.

The statute 27
 Hen. 8. c. 10.

12. “ Provided always, That the king’s
 “ highness shall not have, demand, or take
 “ any advantage or profit for or by occasion
 “ of the executing of any estate, only by
 “ authority of this act, to any person or per-
 “ sons, or bodies politic, which now have, or
 “ on this side of the first day of May which
 “ will be in the year of our Lord God 1536,
 “ shall have any use or uses, trusts or confi-
 “ dences in any manors, lands, tenements, or
 “ hereditaments holden of the king’s highness;
 “ by reason of premier seisin, livery, ouster le
 “ main, fine for alienation, relief, or harriot;
 “ (2.) but that fines for alienations, reliefs and
 “ harriots, shall be paid to the king’s high-
 “ ness, and also liveries and ouster les mains
 “ shall be used for uses, trusts, and confidences
 “ to be made and executed in possession by
 “ authority of this act, after and from the said
 “ first day of May, of lands and tenements,
 “ and other hereditaments holden of the king
 “ in such-like manner and form, to all intents,
 “ constructions, and purposes, as hath here-
 “ tofore been used or accustomed by the order
 “ of the laws of this realm.

13. “ Provided also, That no other per-
 “ son or persons, or bodies politic, of whom

SECT. XI. “ any lands, tenements, or hereditaments be,
 The statute 27 “ or hereafter shall be holden mediate or im-
 Hen. 3. c. 10. “ mediate, shall in any wise demand or take
 “ any fine, relief or harriot, for or by oc-
 “ casion of the executing of any estate by
 “ the authority of this act, to any person or
 “ persons, or bodies politic, before the said
 “ first day of May which will be in the year
 “ 1536.

14. “ And be it enacted by the authority
 “ aforesaid, That all and singular person and
 “ persons, and bodies politic, which at any
 “ time on this side the said first day of May
 “ which shall be in the year of our Lord God
 “ 1536, shall have any estate unto them ex-
 “ ecuted, of and in any lands, tenements, or
 “ hereditaments by the authority of this act,
 “ shall and may have and take the same
 “ or like advantage, benefit, voucher, aid,
 “ prayer, remedy, commodity, and profit by
 “ action, entry, condition, or otherwise, to
 “ all intents, constructions, and purposes, as
 “ the person or persons seised to their use
 “ of or in any such lands, tenements, or he-
 “ reditaments, so executed, had, should,
 “ might, or ought to have had at the time
 “ of the execution of the estate thereof, by
 “ the authority of this act, against any other
 “ person or persons, of or for any waste,
 “ disseisin, trespass, condition broken, or
 “ any other offence, cause, or thing con-

“ cerning or touching the said lands or te- SECT. XI.
“ nements so executed by authority of this The statute 27
“ act. Hen. 8. c. 10.

15. “ Provided also, and be it further
“ enacted by the authority aforesaid, That
“ actions now depending against any person
“ or persons seised of or in any lands, tene-
“ ments, or hereditaments, to any use, trust,
“ or confidence, shall not abate, ne be dis-
“ charged for or by reason of executing of
“ any estate thereof, by authority of this act,
“ before the said first day of May which shall
“ be in the year of our Lord God 1536, any
“ thing contained in this act to the contrary
“ notwithstanding.

16. “ Provided also, That this act, nor
“ any thing therein contained, shall not be
“ prejudicial to the king's highness, for ward-
“ ships of heirs now being within age, nor
“ for liveries, or for ouster le mains, to be
“ sued by any person or persons now being
“ within age, or of full age, of any lands or
“ tenements unto the same heir or heirs now
“ already descended ; any thing in this act
“ contained to the contrary notwithstand-
“ ing.

17. “ Provided also, and be it enacted
“ by the authority aforesaid, That all and
“ singular recognizances heretofore know-

SECT. XI. “ ledged, taken or made to the king’s use,
 The statute 27 “ for or concerning any recoveries of any
 Hen. 8. c. 10. “ lands, tenements, or hereditaments hereto-
 “ fore sued or had, by writ or writs of entry,
 “ upon disseisin in le post, shall from hence-
 “ forth be utterly void and of none effect, to
 “ all intents, constructions, and purposes.

18. “ Provided also, That this act, nor
 “ any thing therein contained, be in any wise
 “ prejudicial or hurtful to any person or per-
 “ sons born in Wales, or the marches of the
 “ same, which shall have any estate to them
 “ executed by authority of this act, in any
 “ lands, tenements, or other hereditaments
 “ within this realm, whereof any other per-
 “ son or persons now stand or be seised to the
 “ use of any such person or persons born in
 “ Wales, or the marches of the same, but
 “ that the same person or persons born in
 “ Wales, or the marches of the same, shall,
 “ or may lawfully have, retain, and keep the
 “ same lands, tenements, or other heredita-
 “ ments, whereof estate shall be so unto
 “ them executed by the authority of this act,
 “ according to the tenour of the same ; any
 “ thing in this act contained, or any other
 “ act or provision heretofore had or made, to
 “ the contrary notwithstanding.”

SECT. I.

The statute did not abolish uses altogether.

the act, he was not seised to the use of any person; but he might afterwards, by his entry, revest the uses, and then being seised to the uses after the act, the use would have been executed in the cestuique use. But this appears to me to be a refined construction upon the words of the statute. Can it be supposed, that the framers of an act, which, as sir Francis Bacon has observed^b, contains the wisest and fittest ordinances, and the most foreseeing and circumspect savings and provisoes, could not foretell, that there might have been future conveyances to uses? Were they unacquainted with the doctrine of resulting uses? And if they had intended, that lands should not pass by future conveyances, operating by way of use, and that resulting uses should not be executed by the statute, can it be supposed, that they would not have expressed themselves clearly upon these points? To me it appears evident, that, although the statute, by incorporating the use and possession, has virtually extinguished the separate existence of the use, it was not in the contemplation of the legislature to prevent conveyances to uses. This opinion is supported by the statute of inrolments, which makes an additional ceremony necessary to the transfer of the use, and by the twelfth section of the statute of uses, which speaks of uses to be

^b Bac. Uses, 30.

man many convey to his wife, altho at common law she was
capable of accepting a gift truly from him; Litt. s. 168; Co. Litt. 112 a; b
v. Gyles 2 Bern. 385. In like manner a married woman has
power (it is only a right to limit a use/may appt. to her husband
or a husband may appt. to ye wife; See Latch 44. et. v. Hunting &
Lefingwell 87 2d; Holde
Preston, 2 1

CHAP. II.] Stat. 27 H. 8. c. 10.

SECT. I.

The statute did
not abolish uses
altogether.

made and executed in possession, after a particular period: and it is sanctioned by Sir Francis Bacon^e, who, with respect to the case of the disseisin before the statute, observes, that the regress of the feoffees, after the statute, was excluded by the two savings; for the first saving respects the right of all persons, except the feoffees; and the second saves the right of the feoffees to their own use; so that between both, the right of the feoffees to the use of another, was shut out^d.

II. There are several circumstances necessary to the raising and execution of uses by virtue of the statute.

SECT. II.

Of the circumstances necessary to the execution of uses.

(1.) As to the person seised to the use.

The statute 27 Hen. 8. did not, nor indeed could, alter the nature of the use^e. It would be a contradiction in terms to say, that an equitable interest, not within the statute 1 Rich. 3d, was a use, within the statute 27 Hen. 8.: and it must therefore follow, that a person not capable before the statute 27 Hen. 8. of being seised to a use, cannot be a grantee to uses after it. I have already mentioned the several persons incapacitated to stand

Persons seised to the use.

^e Bac. Uses, 40.

^d Ibid. 51.

^e "The statute 27 Hen.

" 8. doth only execute old

" uses, but doth not create

" any new uses." Per

Coke, in Cowper v. Frank-

line, 3 Buls. 135.

were made to a for life, reversion to the donor's heirs made of
 body of the donor, reversion to the donor's heirs forever, the
 reversion to the donor's heirs not be void, because the donor did not
 make his reversion further with the whole fee-
 simple out of his person, *Greenwell's case*, Dy. 153 a, pl. 24. So if a man
 Of Uses since the [CHAP. 11]

SECT. II. seised to uses^f; and it is only necessary to
 remark in this place, that if an alien be en-
 feoffed to uses, the statute executes the use
 until office found: but upon office being found,
 the use is destroyed by relation^g. It is the
 same, if a person, having committed treason,
 is made grantee to uses, and is afterwards
 attainted^h.

But the statute 27 Hen. 8. executes trusts
 and confidences, as well as uses; and it appears
 obvious to me, that under these words, the
 legislature intended, that every beneficial in-
 terest, in the shape of a trust, for the perform-
 ance of which the subpœna would lie against
 the trustee, and where the old use, or legal
 estate was not, either by express declaration
 or necessary construction, vested in him,
 should be executed by the statute, notwith-
 standing the trustee, on account of his
 limited or inferior estate, or by reason of
 tenure, could not stand seised to a use be-
 fore the statute. By attending to this dis-
 tinction, I apprehend, that the apparent con-
 tradictions in the books, upon the subject
 under consideration, may be reconciled.

I have already stated the grounds, which
 have occurred to me in support of the con-

^f Ante 56, & seq.

^g Bac. 59. *King v. Boys*,
Dyer, 283. b. pl. 31.

^h Bac. 58, 59. *Throg-*
morton's case, cited *Moor*,
 390, 391.

clusion, that neither tenant for life, nor for years, could stand seised to a use before the statuteⁱ; but it is clear, that the statute executes the trust declared upon the seisin of a grantee for life^k: and so it would have executed the trust declared upon a term for years, if the statute had used the word, "*possessed*," as well as "*seised*;" for the reason assigned by the books, that the trust is not executed in the latter case, is, that the word "*possessed*," is omitted in the statute^l, and not because a termor for years could not stand seised to a use.

To pursue this distinction: if the statute, in describing the persons standing seised to a use, had used the words, "*body politic*," I apprehend, that there would have been no ground to contend, that the trust declared upon the estate of a corporation, would not have been executed by the statute; for the reason, that a corporation could not stand seised to a use was, that the subpoena did not issue against it to compel the performance of the trustⁿ; a reason which has ceased to operate^o.

ⁱ Vide ante 32, & seq.

^k Shep. T. 507. 2 Leon.

16. Vaugh. 49. Crawley's case, Cro. Eliz. 721. Dy. 186. a. See Williams v. Jekyll, 2 Ves. 682.

^l See Jenk. 195.

^m See Bac. 57.

ⁿ See Jenk. 195.

^o 2 Vern. 412. 1 Ves. 467, 468.

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Of the circumstances necessary to the execution of uses.

the statute must containly declare, that in these cases the rule of law still remains in full force, & applicable to common law cases, by w^{ch} the law are created at once, & not created out of y^e seisin of y^e feeoffee. The statute has given one conveyance, the same phrase w^{ch} is formerly used, & this is necessary a conveyance to stand at law & double operation, the strict

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The same construction, I conceive, will apply to a trust declared upon the estate of a tenant in tail; for although Coke, Bulstrode, and others report^v, that in the case of *Cooper v. Franklyn*, it was determined, that he could not stand seised to a use, either by express declaration, or by implication: yet, admitting this construction in the fullest extent, the question will still be, whether the words of the statute do not include trusts declared upon, or limited to arise out of, the seisin of a tenant in tail? The statute mentions the word "*trust*," as well as "*use*;" and there is no doubt, that the word "*seised*," will extend to, and comprise, every freehold seisin; and there is nothing in the statute, which saves the right of a tenant in tail.

The case of *Cooper v. Franklyn* is in fact rightly determined. The use in that case could not have been executed by the statute; and therefore it became necessary to ascertain, whether tenant in tail could, before the statute, stand seised to a use. It was thus: John Walter enfeoffed Thomas, his son, to hold to him and the heirs of his body, to the use of him and his heirs for ever. Now, the use being limited to the feoffee himself, the sta-

^v Co. Litt. 19. b. 2 Co. Shep. T. 509. Jenk. 195.
73. a. 3 Buls. 134. Cro. Jac. Vide *contra*, Godb. 269.
400. Moor, 848. 1 Roll. Bacon, 57, 58. Dyer, 311.
Rep. 384. 2 Roll. Ab. 780. b

to a for life, reversion to himself in tail, the deed will operate purely as a common law, & the reversion will be void; but if ye feoffment were made to his heirs, to ye use of a for life, reversion to ye feoffor in tail, ye reversion will be good - at law the entire fee simple will vest in A, in equity A will be seized to ye uses, & ye statute operating on this seisin will

tute could not execute it; as the statute executes the use in those cases, where it is limited to third persons, as I shall show in the next section. The question, therefore, whether a trust declared upon a seisin conveyed to a person in tail, in trust for *another* person, and his heirs, be not executed by the statute, did not arise in, and certainly was not determined by, the case of *Cooper v. Franklyn*^q.

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(2.) As to cestuique use.

A cestuique use in esse.

I must observe, that all persons, who were capable of receiving or enforcing the use before the statute, can now take under the limitation of a use^r; and the statute on the part of cestuique use particularly couples the words *body politic* with that of person.

The statute says, "That where any person or persons stand or be seised, &c. to the use, confidence, or trust of any *other* person or persons, &c.:" and therefore if a use be limited to a feoffee, conuzee, recoveror, or releasee, such use, generally speaking, is not executed by the statute, but the feoffee, &c. is in by the common law^s. In this case, notwithstanding

^q In *Brent's case*, 2 Leon. 16. *Manwood* observes, that, "at this day, a gift in tail or a lease for life, is made to *another's* use; yet, notwithstanding that the law doth create a ten-

nure upon the lease or gift, yet the use expressed shall be good."

^r See ante, Ch. 1. S. XI. (2.)

^s *Samme's case*, 13 Co. 56. *Altham v. Anglesey*,

2. As to ye execution of use, not allowed by the common law. The leasing & purchase of estates must be by deed, & the capacity of several persons to take as joint tenants by way of use, altho' the title accrues at different periods. The introduction of shifting second and third parties, all of which were repugnant to ye common law, whose simple rules had not admitted that a fee &c. the common

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the grantee is in by the *common law*, yet after the declaration of the use to him, he has not only a seisin, but a *use*; although not the use, which the statute requires; and therefore that seisin, which before the limitation of the use to himself, was open to serve uses declared to a third person, is by the limitation filled up, and will not admit of any other use being limited on it; upon the principle, that a use cannot be limited upon a use. In *Tippins v. Cosins* (Comb. 313.), Hale observes, “Whether feoffees take by the common law, or by the statute, yet where the use is once disposed of to them and their heirs (whether the statute executes it or not), there cannot be a use upon an use, nor a trust upon such an use to be executed by the statute.”

Gillb. Rep. 16, 17. Long
v. Buckeridge, 1 Stra. 106.
Ba. Uses, 43. 62. Gwam
v. Roe, 1 Salk. 90.

“ Possession is transferred to the use by the statute; and therefore an use cannot be expressed upon a use, as feoffment to J. S. to *his own use*, and that he shall be seised to the use of R. H.; this is void to R. H. because the *use* and *possession* were to J. S. before.” Moor, 46. pl. 138.

“ A. enfeoffed B. and C.
“ (his two sons) to the use
“ of himself for life, and af-
“ ter to the use of them and
“ their heirs, *ad ultimam vo-*
“ *luntatem suam perimplen-*
“ *dam*, and afterwards de-

“vised it to D. *Per Gaudy*,
 “D. shall not have the
 “land, for a use cannot be
 “limited to a use. So that
 “when he limits it to the
 “*use* of his two sons and
 “their heirs, he cannot af-
 “terwards limit it to the
 “use of his last will; but
 “the words *ad ultimam*,
 “&c. are void words, as
 “to the limiting any uses
 “thereby. And to that
 “opinion *Clench*, J. agreed;
 “but *Fenner*, J. doubted.
 “*Girland v. Sharp*, Cro.
 “*Eliz.* 382. pl. 2.”

“ If one without any con-
“ sideration enfeoff another
“ by deed, habend. to the
“ feoffee and his heirs, to
“ *his own use*, and the

The ground of this construction is, that before the statute, real property was divided into use and possession; but there was no third kind of interest then known. Consequently, when the seisin was transferred to A. B. and his heirs, and it was added, to the use of him, and his heirs, he had both the legal and beneficial interest; and there is nothing in the statute to alter the nature of his estate.

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In a case^a, where M. gave his land to E. R. and his wife, *habendum* to the said baron and feme; to the use of them, and the heirs of their two bodies, and for want of such issue, remainder to E. M. and his heirs; the question was, whether the baron and feme had an estate tail, or an estate for their lives only? It was argued, that the estate, out of which the use should arise, was an estate for their lives, and the use could not make the estate larger than the limitation of the seisin: but the judges conceived, that there was a difference, where an estate was limited to one, and the use to a stranger, for there the use should not be more than the estate, out of which it was derived; but not when the limitation was to two, ha-

^a feoffee suffer the feoffor
“to occupy the lands several years; yet the right is in the feoffee; because
“express use is contained
“in the deed.” And. 37.

pl. 95. Anon. See post, chap. 2. s. 5. (8.)

^a Jenkins v. Young, Cro. Car. 230. 244. See Young v. Dymock, Dy. 186. a. in notis.

uses limited to arise on a future event where no preceding use is limited, such does not take effect in derogation of any use not there that not results to the grantor, or remainder in being in the use made. A stranger? shall to the use of an or 10 y? hence, is an instance of a future or contingent use or property user limited to take effect.

after a previous lien on to him for life, or for years dett to
in his life, is a full or contingent use, but yet does not
not yet notion of either a shifty or a spring use. They natur-

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their bodies; for this was *no limitation of the*
Of the circum- use, nor was it executed by the statute; but
stances neces- it was a limitation of the *estate* to them and
sary to the exe- the heirs of their bodies *by the course of the*
cution of uses. common law.

So if an estate be conveyed to A. B. and
C. and their heirs, "To hold unto the said
" A. B. and C. their heirs and assigns, to the
" use of the said A. B. and C. for and during
" the natural lives of them, and the life and
" lives of the survivor and survivors of them;"
it should seem, that this is not a statute-use;
but that A. B. and C. will take an estate of
freehold for their lives by the common law^w.

Sir Francis Bacon^x observes, " that the
" statute ought to be expounded, that where
" the party seised to the use and the *cestuique*
" use is one person, he never taketh by the
" statute, except there be a direct *impossibility*
" or *impertinency* for the use to take effect by
" the common law." When a grantee to uses
takes a partial or limited estate under the
limitation, and the remaining portion of the
use is declared to a third person, the grantee
may, in some cases, acquire a legal estate by

^w Bac. Uses, 63. See
an excellent opinion upon
this case by the late Mr.
Booth, published in the

Collection of Cases and
Opinions, vol. 2. 281.

^x Bac. Uses, 63.

1. *These in regard to shifty or secondary uses. it may be observed, 4th 4th convention*
did not allow me free to change from one to another, except upon knowledge of a condon,

no mischief in ye use or equitable est being thus shipp
The same doctrine app^s to have been established with a
struggle after ye state, principally, it is presumed, on,
CHAP. II.] Stat. 27 H. 8. c. 10. 95

the statute; and I apprehend, that the ground
of this construction is, that the words of the
statute being satisfied by the limitation of
part of the use to a third person, courts of
law will give effect to the whole limitation in
such a way, as to make it conformable either
to established rules of law, or to the inten-
tion of the parties.

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stances neces-
sary to the exe-
cution of uses.

First, where the use is limited to the feoffee
in tail out of his own seisin in fee, and the
remainder over to another: as if a feoffment
be made to J. S. in fee, to the use of himself
in tail, with remainder to D. in fee; or if J. S.
covenant to stand seised to the use of himself
in tail, with remainder to the use of his wife
in fee; in both these cases the estates tail
limited to J. S. are executed by the statute*.
But I apprehend, that the construction would
have been different in the case of the feoff-
ment, if the whole seisin had not been limited
to the feoffee; thus, if the feoffment had
been made to J. S. *generally, habendum* to and
to the use of *himself in tail*, with remainder
to the use of A. B. in fee. Now in this case,
J. S. has not a seisin to serve the use to A. B.;
and therefore, if the remainder to him can
take effect at all, it must take effect by the
livery made to J. S. in the course of posses-
sion by the common law^y. So too the con-

* Bac. Uses, 63. 13 Co. Litt. sec. 60. If a feoff-
ment had been made to A.
^y See 2 Roll. Ab. 68. for years, remainder to B.

much quality, necessary for, & consider, every had before, in, or to, the use of the same
them. Every shortly after the state, it was held y^t ye use might alter from one to
another, after stat^y a case of this nature so early as the 6 of Edward, after a livery
of a man it they day many make a feoffment to a man, & that the use will

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struction is different, if the use upon the feoffment be in the first instance limited to the feoffor or a stranger for life, or in tail, with the remainder to the feoffee in fee²; and it should also seem, that if the first use be limited to the feoffee *for life*, or *for years*, with the remainder over in fee, he will take by the common law^a.

Secondly. Where the whole seisin in fee is conveyed to the feoffee, and many estates in the use are carved out of such seisin, one of which estates the feoffee takes; as if A. be enfeoffed to the use of C. D. for life, remainder to the use of himself for life, remainder to the use of J. N. in fee; the use limited to the feoffee will be executed by the statute; for the law will not admit fractions of estates^b.

Thirdly. If J. S. be enfeoffed to the use of himself and a stranger; or if a feoffment be made to a bishop *and his heirs*, to the use of himself and *his successors*; the use is executed by the statute in both cases^c.

in fee, and the livery had been made to A. this would have passed the fee to B. in course of possession at common law.

² Co. Litt. 22. b. Bac. Uses, 64.

^a Bac. Uses, 63. and see Booth's Op. cited ante.

^b Ibid. 64.

^c Bac. Uses, 64.

It was determined, y^t y^e court to be leged to y^e new uses of
pymt & not pmt, by in one & the same deed, sh^d be
y^e use upon y^e contingency accordy to y^e union of it.
in a case of frey^t refere (Woodliff v Drury, Cro Eliz 430)

Here I cannot with propriety omit the advice of Lord Bacon^d. "Now let me advise
"you of this, that it is not a matter of sub-
"tilty or conceit to take the law right, when
"a man cometh in by the law in course of
"possession, and where he cometh in by the
"statute in course of possession; but it is
"material for the deciding of many causes
"and questions, as for warranties, actions,
"conditions, waivers, suspicions, and divers
"other provisoes."

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(3.) The statute requires, that there A use in esse.
should be a use *in esse* in possession, reversion,
or remainder. That use may be either expressed or implied.

First; *Of express uses.* The statute mentions the words *use, trust, and confidence.* If Of express uses, and by what words created.
lands be conveyed to A. and his heirs in trust for B. and his heirs, or in confidence, that he and they shall take the profits, the legal estate is vested in B. by virtue of the statute: and it is to be observed, that upon the execution of every use or trust by the statute, cestuique use shall have the legal estate, *after such quality, manner, form, and condition, as he*

^d Bac. Uses, 65.

^e Eure v. Howard, Prec. Cha. 345. Broughton v. Langley, 2 Salk. 679. Right ex dem. Philipps v. Smith, 12 East, 455. A

trust by will *to pay* the rents to A., or *to permit him* to receive the same, was considered as a use executed. Doe dem. Leicester v. Biggs, 2 Taunt. 109.

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had before in or to the use, confidence, or trust, that was in him^f.

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Besides the words mentioned by the statute, the word *intent* will raise a use^g. Thus a man made a feoffment in fee, *sub conditione, ea intentione*, that his wife should have the land for her life, with remainder to his younger son in fee; the feoffor died, and also the feoffee, without having made any estate. The heir of the feoffor entered as for a condition broken; but it was resolved, that this was no condition, but an estate executed presently by the statute, according to the *intent* of the parties^h. So if it appears, that the parties intended to create a use, though that intention be not expressed by the word *intent*, or by any other of an express fiduciary import, yet the use will be executed by the statute. Therefore in a caseⁱ, where A. in 4th Hen. 7. made a feoffment in fee, and accompanied it with a deed of defeazance or declaration, which gave the feoffor and his heirs a power of entry after quiet enjoyment by the feoffees for 100 years; it was held by the judges, after the term had elapsed, that the lands were vested in the heir of the feoffor by the statute 27 Hen. 8.; for that it appeared

^f See upon these words, Bac. Uses, 47.

^g Hummerston's case, Dyer, 166. a. in notis. Betnam v. Bateson, *ibid.* and

4 Leon. 22. 5 Vin. 44. pl. 5. and notes.

^h Anon. 4 Leon. 2. pl. 3.

ⁱ Boydell v. Walthall, Moore, 722.

42. Plt.

again in *Lloyd v. Carew*, Prec: Cha. 72, Show. Part, Ca. 13, was decided, that a proviso in a lease, settling, upon a certain event the reversion in fee limited to the husband & giving it to another in fee, was valid. Stat. 27 H. 8. c. 10.

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to be the intent of the feoffor, that he should have the lands after the 100 years possession by the feoffees. This intent was the use of the feoffment, which arose out of the possession of the feoffees, and was executed by the statute of uses^d.

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It has been said, that if A. (the grantor) be entitled to a remedy at common law by an action of covenant in order to compel B. (the grantee) to execute estates, there, as no subpœna will lie for A. as *cestuique use* against B.; so no use can be executed in A. by the statute^e.

Secondly; *Of implied or resulting uses.* As the statute did not expressly abolish all future limitations of, and estates created by, uses, there was actually no avoiding the execution of uses, limited or occasioned by conveyances made subsequently to the act. When a feoffment was made without consideration and declaration of the use, what construction was to be adopted? We have seen, that, before the act, the chancery, which judged according to the intention of the parties, would have construed the possession to be in the feoffee, and the use in the feoffor.

Of implied or resulting uses.

^d See *Callard v. Callard*, Cro. Eliz. 344. 2 Roll. Ab. 788. Moore, 687.

^e See *Wingfield v. Lit-*

tleton, Dyer, 162. a. See post, 6th subdiv. of this Sec.

on the acquisition of an estate the one settled shall go over to another branch of the family, the validity of such proviso is now well established; *Micoll v. Micoll*, 13, Carr & Pinnell, 1, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100.

Does the statute destroy this construction?

On the contrary, the case appears to come directly within the meaning of it; the words being, *that where any person*, &c. stands seised to the use of *another*, by reason of any feoffment, &c. or *by any manner of means whatsoever*, then, &c. In this case, the feoffee stands seised to the use of another; viz. the feoffor, by an admitted construction before the act. The act certainly did not intend to alter the manner of raising uses; nor did it mean to make any thing pass by a conveyance, which did not pass before; that is to say, it did not mean, that the *land* and *use* should now pass in a case, in which the *land* only passed before the statute^f. It may therefore be considered as a general rule, that if a feoffment be made, a fine levied, or recovery suffered without consideration and declaration of the use, the use will result to the feoffor, &c. and be executed in him by the statute^g.

Indeed it is said^h, that if a feoffment be pleaded, the use need not be averred to the feoffee; because if nothing appear to the

* *Armstrong v. Wolsey*,
2 Wils. 19. Doug. 26.
Beckwith's case, 2 Co. 56.
58. b. *Dyer*, 146. b. 2

^h Shortridge v. Lamplugh, 2 Salk. 678. 7 Mod. 71. 1 Stra. 107.

in a case where said. were made. I think it is a case where
 £500, upon condition of it to the bargor, pd. £500 to be the
 re-enter & he seized to the use of himself & his heirs, and
 he attempted to alien without the assent of the bargor,
 then to the use of the Bargor & his heirs. The 500 was paid
 CHAP. II.] Stat. 27 H. 8. c. 10. 101

contrary, the use must be intended to be in him; and that such was the form of pleading before the statute. If this be the course of pleading, it may be asked, what utility can arise from the doctrine of resulting uses? To which it may be answered, that although the rules of pleading do not require an averment of the use in favour of the feoffee, yet it may be averred to be in the feoffor; and that the want of a consideration and declaration of the use is a sufficient circumstance to prove, that it was intended for himⁱ.

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I must here observe, that uses generally result according to the estate and interest of the person or persons making the conveyance^k; and he or they, in that case, claim

ⁱ Anglesea v. Altham, Holt Rep. 737. 1 Stra. 107. In the margin of Salkeld's Reports, which belonged to the late Serjeant Hill, opposite to the case of Shortridge v. Lamplugh, is the following MS. note, which, although not in the hand-writing of, is evidently dictated by, the learned Serjeant.

"Contra Vin. Uses (Y. a.) pl. 1. and the notes, pl. 24.; but most of the cases there cited before the statute; and, therefore, Q. if since the statute it is not necessary, in pleading a feoffment or release, for the feoffor

"or releasor to make an averment, that it was to his use: and it seems, that the want of a consideration would be evidence of the truth of such averment, if traversed; but if the deed purports a valuable consideration, the feoffor or releasor cannot be admitted to take such averment. Dyer, 169. pl. 21. S. P. 9. Co. 11. b. accordingly as to a recovery, and Salk. 676. pl. 2. as to a fine and feoffment."

^k See ante Ch. I. S. ix. (3.) Roe v. Popham, Doug. 24. and 22 Vin. 215. pl. 2. and notes, and pl. 6, 7.

did not rise to the charge, because the bargor, only for a condition broken, ought to be in of use, not use & sale, & could not be seized to another use, following to Pollard his 500. and see forward Shortridge, 129 268, 1 Henry 8th case of Shortridge, 129. 5.

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under the old use. However, when a tenant in tail suffers a recovery without consideration or declaration of the use, the use (notwithstanding the aspect of some of the cases¹) will result to the *recoveree* in *fee*^m: for as the recoveror or demandant acquires a seisin in fee, the use, if it result at all, must result according to the extent of that seisin; the words of the act being, that the *estate, title, right, and possession* of the person seised to the use shall be transferred to the *cestuique use*; and in the very distinguished argument of the chief justice *Lee*, in delivering the opinion of the court in the case of *Martin v. Strachan*ⁿ, is the following passage: "It is the use of the *fee simple* that passes to the recoveror from *tenant in tail*, and which results to *him* (i. e. tenant in tail) and his *heirs*, if no use is declared^o."

Where A. is tenant for life, with remainder to B. in tail, with remainder to A. in fee, and A. and B. levy a fine without declaring the uses of it: it should seem, that the use would result to A. for life, with remainder to B. and his heirs so long as he shall have issue, and in default of his issue, to A. and his heirs.

¹ See *Argol v. Cheney*, Latch. 32. *Waker v. Snow*, Palm. 359.

^m 9 Co. 8. b. *Gillb. Uses*, 61. *Nightingale v. Ferrers*, 3 P. W. 206.

ⁿ 5 Term Rep. 107. 110. in note.

^o See post, as to the effect of a declaration, or the want of one, in breaking the descent.

issue, a child living or in ventre sa mere at his death, will
 shall live to attain 21; such child shall have the fee, wd
 good.

In Lloyd v. Barclay (pres. Cha: 72) the fee was shifted in a

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But I am not aware, that the point has been
 determined.

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 stances neces-
 sary to the exe-
 cution of uses.

The preceding observations are made
 upon the case of a feoffment or other con-
 veyance without consideration, and without
 the declaration of *any part of the use*. The
 law equally favours a resulting use upon a
 conveyance, where only part of it is limited,
 and the remainder left undisposed of; it
 being a rule, that so much of the use, as the
 grantor does not dispose of, remains in him^p.
 Thus, if a feoffment in fee be made to the
 use of the heirs of the body of the feoffor,
 the use is undisposed of during his life; it
 will therefore result, and then he will have an
 estate tail executed in him^q. So if the use
 upon a feoffment in fee be declared to the
 feoffee for life, and no further declaration be
 made, the remainder of it will result to the
 feoffor^r: or if the use in the first instance be
 limited to the feoffor in tail without any fur-
 ther declaration, the use in reversion will
 result to him^s; but not so, if the use be li-
 mited to the feoffor for *life* or for *years*;

^p Co. Litt. 23. a. Wood-
 liff v. Drury, Cro. Eliz.
 439. Audley's case, Dy.
 166. a.

^q 1 Mod. 161, 162. 1
 Roll. Rep. 240. 22 Vin.
 283. pl. 2. and the cases

collected in the note. Ibid.
 200. and cases in note to
 pl. 7. Post, s. 5. (5.)

^r See next page and 1
 Ves. 488.

^s Vide Dy. 111. b. in
 notis.

after 2 lives in being. The rule in this head were these 1897 in their infancy. Shew that
 intended that their fee should not be executed, as not being confined to lives in being & if ye
 lives of the heirs of the body of the feoffor, then, how to take effect at the expiration of 21 years
 after 2 lives in being. The rule in this head were these 1897 in their infancy. Shew that
 intended that their fee should not be executed, as not being confined to lives in being & if ye

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because if it did, the feoffor could not have an estate for life or years, as he intended'.

It is the intention of the parties, to be collected from the face of the deed, that gives effect to resulting uses. Therefore, it has been said, that the payment of 5s. or the like, serves as an implied declaration of the use to the feoffee, when it is not otherwise expressly disposed of. On the contrary, the want, both of consideration and declaration shows, that the feoffor never intended to part with the use. This has been the construction, when no part of the use has been expressly limited. But the same rule does not hold, as I have already stated, where any part of the use is limited from the feoffor, &c.; and the residue left undisposed of; for the express declaration in this case is presumptive proof, that he did not mean, that the grantee should have the remainder of the use. Therefore if an estate be granted even for a *valuable* consideration to feoffees and *their heirs*, to the use of them for *their lives*, it should seem, that the remainder of the use will result to the grantor": for the extent of

^u See *Wilkes v. Leuson*, Dy. 169. *Wilkins v. Perrat*,

Moor, 876. Piers v. Hoe, Cro. Eliz. 131. 1 Leon. 125.—Booth's opinion cited *sup.* See more of resulting uses post, sec. 5th; subdivisions 2d and 5th.

the shifting use. The proviso left noticed, shifts once upon
acquisition by the same party of another, is, for this reason, also
penned generally, & not confined to an union of years with any
particular period. In the case of St. George v St. George, in y^e 4th of Lord
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the express limitation is the measure of the
consideration.

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stances neces-
sary to the ex-
ecution of uses.

But when in a conveyance to a purchaser,
the contract is recited to be for the purchase
of the absolute fee simple, the consideration
extends to the entire use; so that I conceive,
there can, in that case, be no resulting use
to the grantor or vendor. The payment of
the consideration money divests him of any
beneficial interest, which constituted the use
before the statute; and if any part of the use
were to remain unlimited, it would vest, as it
should seem, in the purchaser, upon the prin-
ciple of modern trusts, resulting or arising by
implication; "trusts result to the party from
whom the consideration moves." *Pelly v.*
Maddin, 21 Vin. 498. pl. 15. A perplexing
case sometimes arises in practice. A pur-
chased estate is conveyed to the use of the
releasee and his heirs during the life of, and
in trust for, the purchaser, in order to prevent
dower, and after the determination of that
estate, to the use of the heirs and assigns of
the purchaser. According to the limitation,
the heirs would take as purchasers a contin-
gent remainder in fee; and if the use resulted
to the vendor, the purchaser could not con-
vey, nor devise it, without another convey-
ance by the vendor; which construction
appears to me improper, as the consideration
has exhausted the use. The use would, I

to arise upon the distinct period of a general sale of life, why have the purchaser
But y^e 4th by conveying y^e decree in Ireland, y^e use was provided upon the proviso that
y^e validity y^e 4th limited in time: y^e 17th y^e 20. The same argument was considered to be highly
Stoffe, 2 y^e 18th y^e 21st. But Lord Hargrave in answer to it, says y^e there was no doubt with respect

the validity of *q. p. p. v. o.*; several uses were held under similar
 cons. No rule of law is contradicted by it; if no recovery was
 offered, it might take place at any distant time. He might as
 be he told *q. t. an est. tail was an illegal est.* Because it may endure
 ever, & must, where the cur. is in the crown; See *Goodwin v. White*
 106 Of Uses since the [CHAP. II.]

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Of the circum-
 stances neces-
 sary to the exe-
 cution of uses.

apprehend, vest in the purchaser by implica-
 tion either for life (which would obviate all
 difficulty), or in fee, subject to the contingent
 remainder; and in the latter case, the pur-
 chaser and his trustee might defeat the con-
 tingent remainder; but if not defeated, the
 purchaser would be prevented from devising
 the estate at law. In any way of considering
 the case, I think the purchaser must be con-
 sidered as entitled to the beneficial interest in
 fee; for the limitation to the right heirs
 could not be considered as an advancement
 for them.

In the case of a springing use, arising
 from a seisin in fee simple, where there is no
 express limitation of the use, until the event
 happens upon which the springing use is to
 arise, the use will result to the grantor in
 fee simple. Thus if A. enfeoff B. and his
 heirs, to the uses following, that is to say,
 after marriage had between A. and Anne, his
 intended wife, to the use of A. and Anne, and
 the heirs of A.; the use, until the marriage,
 will result to A. in fee^v.

The statute of frauds, 29 Car. 2. c. 23. by
 an express saving, does not extend to trusts
 and confidences, that arise or result by impli-
 cation of law. It has however been said, that
 as a use now becomes a *legal* estate by the

^v 22 Vin. 220. pl. 1. (P.)

1 Feb. 102; *Atty. Gen. v. Willmors* 3 Wils. 112.

operation of the act, that clause is not applicable to it^w.

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Of the circumstances necessary to the execution of uses.

It has been determined, that a resulting use may be rebutted by parol evidence^x. But neither the grantor nor grantee can aver a use to a third person since the statute^y.

(4.) By the words of the statute every species of real property (except copyhold estates^z), whether corporeal or incorporeal, in possession, reversion, or remainder, may be conveyed to uses. The property, however, must be *in esse* at the time of the creation of the use. Therefore if A. covenant to stand seised of lands, which he shall afterwards purchase, to certain uses; no use can arise by virtue of such covenant upon lands, of which he may afterwards become the purchaser^a. So if A. convey his lands by bargain and sale to J. S. in fee, with a way over other lands; the right of way does not pass^b: because by the operation of the *bargain and sale* the use is first vested in the bargainee; and consequently there is no previously existing seisin of the right of way, out of which

An hereditament.

^w Lamplugh v. Lamplugh, 1 P. W. 112.

^x Roe v. Popham, Dougl. 26.

^y 2 Salk. 676.

^z See post, sec. 8.

^a Yelverton v. Yelverton, Cro. Eliz. 401. Moor, 342.

^b 2 Roll. Ab, 970. 22 Vin.

27. pl. 7, 8, 9. A feoffment in fee upon condition that if feoffor do such a thing, he shall re-enter and retain the land to the use of a stranger, the use is void.

1 Leon. 269. pl. 362.

^b Beaudley v. Brook, Cro. Jac. 189.

SECT. II. the use can arise. But the grant of rent-charge *de novo* to uses is within the statute^c : because the land is the seisin out of which it arises.

Of the circumstances necessary to the execution of uses.

(5.) In order that a use may be executed by the statute, there must be a seisin in the feoffee or grantee at the time of its execution : for, as Lord Bacon has observed^d, “ the matter and substance of the estate of *cestuique use* is the estate of the feoffee, and more he cannot have.” When a feoffment is made to A. and his heirs, to the use of B. and his heirs, or to the use of B. for life, with remainder to the use of C. in fee ; here the seisin of A. is entire, and upon the execution of the conveyance, it is immediately transferred from him according to the limitation of the use. Vested remainders or reversions may be legally granted ; and consequently uses may be limited upon the seisin so transferred in remainder or reversion ; but consistently with the rule just noticed, as contingent remainders, or rents already granted to take effect upon a contingency, cannot be transferred at law during the suspense of the contingency, it follows, that no use can be limited upon the transfer of such contingent remainder or rent. The statute transfers the legal possession or estate to the use ; but a seisin, not legally vested, cannot serve a use.

^c Bac. Uses, 43.

^d Ibid. 47.

It sometimes occurs in practice, that a conveyance is made to A. B. and C. D. and the survivor of them, and the heirs of such survivor, to uses limiting the estate in strict settlement. In this case, the remainder to the survivor of A. B. and C. D. is a contingent remainder; and until the death of one of them, there is no actual vested seisin to serve the uses.

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Of the circumstances necessary to the execution of uses.

The seisin transferred by feoffment, fine, recovery, and lease and release, for the purpose of serving uses, may be called an actual seisin; but by the operation of the statute there may be a possibility of seisin, or *scintilla juris*.

First. *Of the actual or present seisin.* It may be considered as a general rule, that the seisin of the feoffee, releasee, &c., must be commensurate to the use declared upon it; or in other words, cestuique use cannot have an estate in the use more extensive, than the seisin out of which it is raised. Thus if land be conveyed to A. for life, to the use of B. for life, in tail, or in fee, the estate of B. must determine upon the death of A.^e

Of an actual seisin co-extensive with the estate.

If a seisin in fee be properly created, that seisin will serve uses declared upon it, al-

^e Dy. 186. a. Vaugh. 49. Crawley's case, Cro. Eliz. Bac. Uses, 47. Cro. Car. 721.
231. 3 Bulst. 184. See

SECT. II. though the person, who created it, had not an estate in fee-simple in the lands conveyed. Thus, when a tenant in tail suffers a recovery, the use may be declared in fee^f: and if a tenant for life or years make a feoffment in fee, and the use be declared in fee, such use will be executed according to the extent of the tortious seisin acquired by feoffment^g.

Of the possibility of seisin.

Secondly. *Of the possibility of seisin.* The *scintilla juris*, or possibility of seisin, is supposed to exist in *feoffees*, *releasees*, &c., to uses, when all actual seisin is taken from them by the operation of the statute, in two particular cases: first, upon the limitation of springing uses: 2dly, upon the creation of contingent uses. I shall in this place speak of springing and contingent uses, so far only as they will explain the nature of the *scintilla juris*.

First, if a feoffment or lease and release be made, a fine levied, or recovery suffered to A. and his heirs, to the use of B. and his heirs, until C. pay a sum of money, and then to the use of C. and his heirs; in this case the use is executed in B. and his heirs by the statute; and as this use is co-extensive with the seisin of A., there can be afterwards no *actual* seisin remaining in him: but when C. pays the mo-

^f See ante, 101, 102.

^g Co. Litt. 10. a. 180. b. 188. a.

ney, the former use to B. ceases, and a new use springs up, and is executed in C. in fee. The question is, out of whose seisin is the secondary use to be served? It cannot be served out of the possession of B., because he is *cestuique use*; nor out of the original seisin of the feoffor, &c.; because the livery, &c., entirely divested him of all possession whatever^b. Neither could the use to C. be executed until payment of the money; because the *two* uses could not exist at the same timeⁱ. To avoid these difficulties, it was said, that the use should arise out of the original seisin of A. the grantee; that although no actual seisin remained in him after the execution of the use to B., yet upon the cesser of the use limited to B., the original seisin reverted to A. for the purpose of serving the secondary use to C.: and that before the money was paid, this possibility of reverter of the original seisin should be considered as a *possibility of seisin*, or *scintilla juris*.

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Of the circumstances necessary to the execution of uses.

Secondly. A feoffment is made to J. S. in fee, to the use of A. for life, remainder to the use of his first son unborn in tail, with remainder to the use of B. in fee. Does any and what seisin remain to J. S., until the birth of a son of A.? The solution of this question formed the great difficulty in Chudleigh's

^b Vide 1 Leon. 269.ⁱ Co. Litt. 271. b.

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Of the circumstances necessary to the execution of uses.

case^k. On the one hand it was said, that an actual estate in remainder vested in J. S. to serve the contingent use, when it came *in esse*; whilst others were of opinion, that no part of the original seisin remained in J. S., and that the contingent use, when it should arise, must be served out of the former seisin of the grantee: that is to say, that as the whole seisin was taken out of J. S., so much of it as was necessary to serve the contingent use, when it came *in esse*, should remain in the preservation and custody of the law, and should not return to, or revest in, him. But both these opinions were considered erroneous: for with regard to the first, as the use was limited to A. for life, remainder to B. in fee, this was commensurate to the whole fee, and did not admit of any intervening estate, until that limited to the son should arise; besides, if J. S. had a vested estate in remainder, he might enter for a forfeiture, and punish waste, &c.; and it is clear, that the parties intended him no such benefit. With respect to the second notion, it was thought to be against the words and meaning of the statute, which requires the grantee to be seised *at the time of the execution of the use*. But the true construction appears to be, that J. S. has not an actual estate or seisin during the suspense of the contingency; nor is the whole seisin

^k See the case post, s. 8. 1 Co. 120. a.

taken from him; but that the possession is executed according to the limitation of the uses; that as a new use will arise upon the birth of A.'s son, so as to precede the limitation to B., so upon that event a seisin, co-extensive with the estate in use limited to such son, will vest in J. S. for the purpose of serving it: and that until the contingency happens, J. S. has a mere possibility of seisin, which may never become actually vested in him.

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Of the circumstances necessary to the execution of uses.

The doctrine of *scintilla juris*, or possibility of seisin, has been generally admitted since the decision in Chudleigh's case, in the reign of Elizabeth¹, until the late Mr. Fearn^m suggested some doubts, as to the necessity and propriety of it in the case of contingent uses. The point has since become the subject of earnest controversyⁿ: but the author of this work, following the received opinion^o, considers the doctrine established upon principle and authority; and consequently he

¹ 1 Co. 120. a.

^m 1 Fearn, 446 to 446.

ⁿ Sugden on Powers, 17. Note to Gilb. Uses, 296. Rowe's Bacon, 151. and his Scintilla.

^o Probably no man more accurately understood the laws of uses, and the construction of the statute, than the late Mr. Booth; and he certainly considered

the doctrine of *scintilla juris* established. See Opinion at the end of Shepherd's Touchstone. Indeed lord Eldon, in Maundrell v. Maundrell, 10 Ves. 255. seems to consider the doctrine as peculiarly Mr. Booth's: "the use would engraft itself upon *what*" *Mr. Booth calls scintilla* "*juris*, in the releasees."

SECT. 11. thinks that this possibility of seisin may be released or destroyed, or by the failure of heirs of the grantee to uses become extinguished^p.

Of the circumstances necessary to the execution of uses.
By what conveyance the use may be raised.

(6.) The words of the statute expressing the conveyance or deed, by which the use is created, are these, "bargain, sale, feoffment, fine, recovery, covenant, contract, agreement, will, or otherwise, by any manner of means whatever^q." Notwithstanding the generality of the above words, in order to raise the use by the statute, there must be either a direct or actual conveyance, operating by way of transmutation of possession, or a contract or covenant, operating as a *bargain and sale*, or a *covenant to stand seised to uses*: for as to *contracts and agreements*, which are merely referrible to actual conveyances, they certainly do not raise uses under the statute^r. Thus^s, where T. S. by indenture, covenanted and granted, in consideration that A. B. had conveyed divers lands and tenements to him in fee-simple after the death of the said A. B., that the said T. S. would levy a fine to conu-

^p See post, sec. 5. (6. 7.) sec. 8.

^q It seems, that there may be a surrender to a use. Cro. Eliz. 688. A use cannot be raised upon a release operating by way of *Mitter le droit*. 13 Co. 55.

Note to pl. 1. 22 Vin. 209. (O. 3.)

^r See Hore v. Dix, 1 Sid. 25. Petfield v. Pearce, 2 Roll. Ab. 789.

^s Bainton's case, Dy. 96. a. Shep. Touch. 82.

zees of others lands ; by which fine the said other lands should be assured to the said T. S. for life, remainder to the said A. B. in tail ; and no fine was levied : it was determined, that the covenant to levy a fine did not of itself change or raise a use.

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In another case^p, A. by indenture covenanted, that she would assure lands by recovery to B. (her son-in-law) to and for such uses, as should in a subsequent part of the said indenture be declared. B. covenanted, that within eight months after the assurance made, he would make an estate to A. for life, remainder to B. and C. his wife in tail, remainder over in fee. The recovery was suffered accordingly ; but no further declaration of the uses was made in the said indenture ; nor were the estates conveyed by B. pursuant to his covenant. It was held, that neither the recovery, nor covenant by B. could change or declare the use, so as to execute it in A. for life, &c. ; and that it could not result to A. in fee : because as she had her remedy against B. at common law by an action of covenant, no *subpœna* would lie to compel him to execute the estate.

By more modern resolutions, it has been determined, that articles entered into before

^p Wingfield v. Littleton, *ley's case*, *ibid.* 166. a. Dy. 162. a. See also Aud-

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Of the circum-
stances neces-
sary to the exe-
cution of uses.

marriage, to settle lands to certain uses, do not alone raise the uses; but that an actual conveyance is necessary^a. This principle was adopted in the case of *Trevor v. Trevor*^r, There A., in consideration of an intended marriage, covenanted with trustees before the end of two years to settle lands upon the said trustees, to the use of himself for life, without waste, remainder to the use of his intended wife for life, remainder to the use of the heirs male of him on her body to be begotten, and the heirs male of such heirs male lawfully issuing, remainder to his own right heirs: and A. covenanted, that in case the uses were not well raised according to the meaning of the articles, then he and his heirs would *stand seised* of the premises, until such time as a farther assurance should be made thereof, *to the uses mentioned in the articles*. No settlement was made pursuant to the articles, and several years afterwards A. and his wife levied a fine of the same lands to other uses. The Lord Chancellor considered the whole of these articles, as in their nature *executory*: and, among other things, observed, that the covenant to stand seised in the latter end of them, could not be taken as a final settlement from the words of it; and that the precedent part of them was provisional only,

^a See *Edwards v. Freeman*, 2 P.W. 436. 439. 447.

^r 1 P. W. 622. 1 Eq. Ab. 387.

viz. to stand seised till a settlement should be made^a.

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Of the circumstances necessary to the execution of uses.

The preceding cases are upon covenants or contracts referring to a subsequent conveyance. The same rule seems to have prevailed, where the covenant is merely executory, and upon which an action of covenant appears to have been the proper remedy, in case the covenant was not performed. Thus, when a father covenanted with his eldest son, that certain lands should, after the death of the father, descend, remain, or be to the son and his heirs; no use arose upon this covenant, because, as the book states, it was executory, and for which an action of covenant would lie'. So where A., seised in fee, covenanted with B. in consideration of a marriage to be had between J. S. and J. D., that certain lands should, after the death of A. remain unto the use of the said J. D. and J. S. and to the heirs of the said J. D.: the marriage took effect; but it was determined, that no use was raised by the covenant; it not being

^a In *Hylton v. Biscoe*, 2 Ves. 304, 308. Lord Hardwicke seems to have thought differently: "If John the father had had the legal estate, the deed in 1694 would have passed it; therefore it does not rest barely in covenant. If

"he had the legal estate, the covenant to stand seised would have had its operation in point of law."

^b *Blitheman v. Blitheman*, Cro. Eliz. 279. See Benl. 121. pl. 153. Moor, 122. pl. 269.

SECT. II. a covenant to stand seised, but merely that the lands should remain^t.
Of the circumstances necessary to the execution of uses.

To the preceding observations, it seems necessary to add the following case.—A. bargained and sold land to B. and his heirs for 500*l.*, upon condition that if A. paid B. 500*l.* he might re-enter, and be seised to the use of himself and his heirs, until he attempted to alien without the assent of B., and then to the use of B. and his heirs; and a fine was levied to those uses. A. paid the 500*l.* and entered; and afterward aliened to J. S. without assent of B.

Per *Ld. C. Egerton*, no use will arise to B.; because A., entering for the condition broken, ought to be in of the old use and estate, and cannot be seised to the other useⁿ.

SECT. III. III. Having considered the several circumstances necessary to the raising and execution of uses by the statute; I shall now state the effect of the transfer of the possession to the use by the statute, as between the grantee and the cestuique use.

As to the effect of the union of the use and possession.

^t *Buckler v. Symons*, 2 Roll. Ab. 783. In *Crossing v. Seudamore*, 1 Vent. 141. it is said, that no use arose in the case in *Moor*, 122. pl. 269. for the uncertainty, how it was intended the daughter should take. See the different cases upon this point collected in pl. 1. 22 Vin. 211.
ⁿ *Holloway v. Pollard*, *Moor*, 761.

1st. *As to the estate of the grantee.* It is obvious, that as the statute has made the estate of cestuique use legal instead of equitable, and entirely divested the feoffees, releasees, &c. of all estate whatever, most of the incidents, which attended the use in its fiduciary state, are now at an end. With respect to the feoffee, he has no interest at all in the land; and therefore on his account, it cannot escheat, nor be forfeited; nor is it subject either to dower or courtesy on account of his momentary seisin^w. However, as the statute only transfers the legal estate to the use, it does not interfere with the title-deeds: and therefore it is a point, which appears to me to be clearly settled, that the feoffee, or grantee to uses is entitled to the custody of them^x. Upon this account it has been repeatedly determined, that a *profert* is not necessary in pleading a gift under the statute of uses^y.

SECT. III.

As to the effect of the union of the use and possession.

In respect to the feoffee, releasee, &c.

The grantee entitled to the possession of title-deeds.

2dly. *But as to the estate of cestuique use,* it is subject to escheat, to courtesy, dower, and all the incidents, to which a *legal* estate is liable^z.

^w See 2 Comm. 333. Sneyd v. Sneyd, 1 Atk. 443. Note, pl. 31. Dyer, 283. b.

^x Estofte v. Vaughan, Dyer, 277. a. Stockman v. Hampton, Cro. Car. 441. Huntingdon v. Mildmay,

Cro. Jac. 217. Reynell v. Long. Carth. 315. Whitfield v. Fausset, 1 Ves. 387. 394.

^y See cases supra, and 3 Term Rep. 156.

^z See 2 Comm. 333.

SECT. III.

As to the effect
of the union of
the use and pos-
session.

Rents conveyed or limited to uses are executed by the statute; and cestuique use is entitled to all remedies and rights relative thereto; but not to *collateral* rights².

The 14th section of the statute of uses, which vests in cestuique use the same or the like advantage, benefit, voucher, &c., is expressly confined to estates made before the 1st of May 1536; and from this circumstance there is ground to suppose, that none of these benefits would have been carried to the cestuique use by the general words of the act. But it is clear, that cestuique use is entitled to all benefits and advantages inherent to the estate, and to covenants running with the land.

In Lincoln College's case, it is said, "that he who hath a reversion by a limitation of a use, although he be in the post, yet he shall take benefit of a condition, as an *assignee*^a within the stat. of 32 H. 8. c. 34^b."

² Boscawen and Herle v. Cooke, 1 Mod. 223. 2 Mod. 138. S. C.

^a But an assignee cannot take advantage of the implied condition annexed to an *exchange*. Bustard's case, 4 Co. 121. a. See also Coventry v. Coventry, 3 Atk. 365. It seems to follow, that where an exchange is made under a

power of exchanging, reserved in a settlement, there should be an express power reserved to the cestuique use of entry in case of eviction. See tit. Lease and Release, 2 vol. at the end of that title.

^b Co. Litt. 215. a, b. Appowel v. Monnoux, Mo. 97. 8 Leon. 225. in Scot's case.

And in *Smith v. Tyndal*^c, it is one of the resolutions of the court, “ that though a cestuique use is in the post, and not in the per, yet he may take advantage of warranty annexed to his estate; ratio est, because by the statute of uses, the estate in law in possession is transferred to his use, and he is tenant of the legal estate, and has all advantages, that the tenant had before to defend his estate; therefore he may rebut, for that is to defend; but he cannot vouch, for that is to recover in value for the loss.”

SECT. III.

As to the effect of the union of the use and possession.

In the case of *Roll v. Osborne*^d, Warburton thought, “ that the stat. 27. H. 8. of uses gave the benefit of the warranty to cestuique use, and that he shall vouch as assignee, and have warrantia chartæ; and that tenant for life created by an use, shall have benefit for his time of the warranty, and may vouch, or have warrantia chartæ; but that he must make his count accordingly.”

IV. I proceed to explain, in what respects legal estates created, or uses executed, by the statute, correspond with the rules of the common law.

SECT. IV.

Of limitations of uses which agree with the rules of the common law.

And first, with respect to the limitation of estates in fee-simple.

^c 2 Salk. 685.^d Mo. 859. pl. 1180.
Trin. 9 Jac.

SECT. IV.

Of limitations
of uses which
agree with the
rules of the
common law.

As to estates in
fee-simple.

For life.

It is settled, that the same words, which are necessary to create an estate in fee upon a conveyance at common law, are equally necessary upon a conveyance to uses since the statute. It is true, that if before the statute, a man had bargained and sold his lands for a valuable consideration, without having limited the use to the heirs of the bargainee, chancery, which considered the intention of the parties, would have decreed an estate *in fee*^e. But as the statute now executes the use, and the bargainee has a legal estate, the same construction must be had upon this legal estate by the statute, as upon estates by the common law; and, therefore, in the case put, the bargainee since the statute, can only have an estate for life^f. So it seems, that if a feoff-

^e 1 Co. 100. b.

^f Corbet's case, *ibid.* 87. b. Jenkins, 332. pl. 65. "The use of a fine is limited to A. by indenture, without mention of any estate in particular: this is an estate for life."

It is proper to notice in this place the case of Kenworthy v. Bate, 6 Ves. 793. An estate was settled by deed "to the use of such child or children of B. P. without adding, for such estate or estates), as the said B. P. should by will appoint." The Master of the Rolls is reported to have said, "In this case, there is an absolute power to give the *fee-simple* to any one of the children."

It is probable, that the Master of the Rolls did not advert to the omission in the power of the words, "for such estate or estates;" for it would be difficult to show, that the power without these words would authorize the appointment of the legal estate in fee-simple to a child. If the estate had been settled by the deed itself "to the use of the child or children of B. P.," without adding words of limitation, the children would, beyond doubt (even in the case of a will, *Foster v. Romney*, 11 East, 594.), have taken life-estates only; and the power merely authorizing an appointment "to the

ment be made to the use of B. and his *heirs* SECT. IV.
male lawfully engendered, as this limitation Of limitations of uses which agree with the rules of the common law.
 would at common law have created an estate
 in fee-simple, so it will upon a conveyance to
 uses^g.

(2.) It is a rule generally established, that Estates tail.
 the word *heirs* is necessary to create an *estate*
tail upon a conveyance at common law^h. It
 is the same with respect to a deed operating
 by way of use. Therefore, if a feoffment be
 made to the use of J. S. and the *issue*, or *issue*
male, of his body, this limitation cannot raise
 an estate tail in J. S.ⁱ In the case of Leigh
 v. Brace, a feoffment was made to A. and B.^h,
 and their heirs, to the use of W. B. for life,
 with remainder to the use of T. B. and his
 heirs for ever; and for default of *issue* of the

“ use of such child or chil-
 “ dren;” upon what ground
 can the limitation of the
 use by the exercise of the
 power be more extensive,
 than the same limitation
 would have been, if origin-
 ally inserted in the deed
 itself? In a subsequent case
 of a will, where there is a
 greater latitude of con-
 struction, the Court of
 King’s Bench considered
 the words, “ in such man-
 “ ner and form,” to be
 equivalent to the words,
 “ for such estate or estates;”
 but declined to give any
 opinion upon the effect of

a power, where there were
 no words of a similar im-
 port. See King v. Mar-
 quis of Stafford, 7 East,
 521. 526.

^g Abraham v. Twig, Cro.
 Eliz. 478. note 2. Har. Co.
 Litt. 20. b.

^h Co. Litt. 20. a. 2 Inst.
 334.

ⁱ Nevel v. Nevel, 1 Roll.
 Ab. 337. 1 Brownl. 152.
 Makepeace v. Fletcher,
 Com. Rep. 457.

^k Carth. 343. 3 Salk. 337.
 1 Ld. Raym. 101. Rep.
 Temp. Holt, 668. 5 Mod.
 266.

SECT. IV.
Of limitations
of uses which
agree with the
rules of the
common law.

body of T. B., remainder over. It was adjudged, that T. B. took an *estate tail*. This case, however, cannot be considered as an authority against the rule alluded to: for as the limitation was to T. B. and his *heirs*, the subsequent words, *in default of issue of the body*, were only intended to explain the extent of the preceding limitation, or what particular class of *heirs* should take, viz. *heirs of the body*. In this view, the same limitation would have created an estate tail at common law¹; and it is observable, that none of the reporters of this case (except Carthew) mention, that it was determined upon the principle, that limitations in a conveyance, operating by way of use, should be construed in a different manner from mere common law conveyances. But admitting the case to have been adjudged upon the principle stated by Carthew, the subsequent case of *Makepeace, v. Fletcher*^m has established the doctrine in *Nevel v. Nevel*.

(3.) Whether words *regulating* or *modifying* an estate created by a deed, operating by way of use, shall be construed in a different manner, when applied to a common law conveyance, is a point, upon which there has been

¹ See Perk. s. 171. 173. Year Book 19 Hen. 6. 74. per Vampage. Co. Litt. 21. a. Note to 1 P. W. 57. 2 Vol. of Cases and Opinions,

279. Mr. Booth's opinion. Co. Litt. 20. b. Year Book 5 Hen. 5. 6. *Shelly v. Sarsfield*, 10 Vin. 256. pl. 9.

^m Com. Rep. 457.

a difference of opinion. Lord Hardwicke, in a case where the question was, whether the words, *equally to be divided*, would create a tenancy in common, in a deed operating by way of use, observed, that though *limitations* in a deed to uses could have no greater latitude than in common law conveyances, yet as to words of mere *regulation* or *modification* of the estate, he saw no harm in giving them a reasonable construction to answer the intention; and he accordingly held, that those words created a tenancy in commonⁿ: on the other hand, Lord Thurlow, in a case nearly similar^o, expressed himself thus: "The question is, whether *deeds to uses*, in the nature of wills, should be construed so widely as wills have been? I should be sorry to give into this; for I think no good has been done by the wide construction of wills."

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Of limitations of uses which agree with the rules of the common law.

Words of modification.

Yet it seems to have been in fact determined, that both in a covenant to stand seised to uses, and in a lease and release^a, and in a

ⁿ Rigden v. Vallier, 2 Ves. 252. 257. 3 Atk. 731. See also Goodtitle v. Stokes, 1 Wils. 341. and 2 Vent. 365. Fisher v. Wigg, 1 P. W. 14. "Though the law is strict against estates at common law, which are to arise upon conditions precedent, yet it is not so

"in limitation of uses, where the intent is to guide the estate, no more than 'tis in devises." Moore, 519. Arg. cites Paget's case, 31 Eliz.

^o Stratton v. Best, 2 Bro. Cha. Rep. 233.

^a Goodtitle v. Stokes, 1 Wils. 341. 2 Vent. 365.

SECT. IV. surrender of copyhold property^b, the words, “*equally to be divided*,” will create a tenancy in common. There has then been a deviation from the strict rule of the common law, in the case of creating a tenancy in common; and this deviation has been derived from the construction of wills, in order to favour the intention. It may, therefore, be a question, how far the rule as to wills may be extended to limitations of uses? The word, “*respective*,” and the word, “*several*,” in a will, seem equivalent to the words, “*equally to be divided*,” and ought not these words to have a similar operation in the limitation of uses?

As to the cesser of the estate of tenant in tail during his life.

(4.) It is a maxim of law, that a condition or limitation annexed to an estate ought to destroy the *whole* of the estate, to which it is annexed, and not a *part* only of it^p. This rule is applicable to limitations by way of use, which operate, so as to defeat or avoid estates: therefore, if an estate be limited to the *use* of J. S. *in tail*, with a proviso, that if he do such an act, his estate shall cease *during his life*, this proviso is void^q. It was agreed, that lands should be limited to the use of H. C. and the heirs male of his body, with

^b Fisher v. Wigg, 1 P. W. 14.

^c Per Roll. C. J., in Forrell v. Frampton, Lyle, 434. and see Heathe v. Heathe, 2 Atk. 121.

^d See Sheppard v. Gibbons, 2 Atk. 441.

^p 1 Co. 86. b. 4 Burr. 1941. Litt. s. 720, 721, 722, 723.

^q 1 Co. 86. b.

divers remainders over, and with this proviso, "That if the said H. C. or any of the heirs males of his body, should attempt or make any feoffment, &c., that *his estate* should cease, *as if he was dead*, and that then the said W. B. and the other feoffees, and their heirs, should stand seised to the use of such person, to whom it ought to descend or remain by the said deed intended, as if he was dead, with the remainders over as aforesaid." The proviso was considered repugnant and void^r. However, as a condition may be annexed to an estate tail to determine it *wholly* by the re-entry of the donor or his heirs^s, so a limitation by way of use may enure to defeat an estate tail, as if tenant in tail were dead, *without heirs of his body*^t. This doctrine has given rise to the introduction of two species of provisoes in modern practice. The one is adopted in a settlement of estates, where it is intended, that the person in possession of them, under the settlement, should use the name, and bear the arms of the settlor; and in case of refusal or neglect, that the uses and estates thereby limited shall cease and determine, as if the person so refusing or neglecting, being tenant for life, were dead, or being tenant in tail, were dead

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^r Cholmley v. Humble, cited 1 Co. 86. a. See Corbet's case, *ibid.* 83. b. Mildmay's case, 6 Co. 40. a. Tarrant's case; Moor, 470.

^s Litt. s. 362. Croker v. Trevithin, Cro. Eliz. 35. 1 Leon. 292.

^t Vide Mary Portington's case, 10 Co. 36.

SECT. IV. without issue, inheritable under the intail^a.
 Of limitations of uses which agree with the rules of the common law. The other proviso is used in settlements, for the purpose of defeating the estate of a tenant in tail, in case he shall become entitled to a certain other estate; and limiting or shifting the use upon that event, to another person, as if such tenant in tail were dead without issue^v.

Fractions in the limitations of the use.

(5.) Another maxim is, that a man cannot make a fraction in an estate, in the case of a limitation by way of use, which cannot be done in a conveyance by livery in possession. Therefore Walmesley^w, justice, said, “If a man makes a feoffment in fee of land to the use of A. and his heirs every Monday, and to the use of B. and his heirs every Tuesday, and to the use of C. and his heirs every Wednesday, these limitations are void, for we do not find any such fractions of estates in law.”

Uses cannot be limited so as to abrogate the law.

(6.) It remains to observe, that the statute executes no limitations of a use, which if executed would be fraudulent, and thereby abrogate the law. Thus, if there be a limitation to the use of A. and his heirs, provided that if he give a mortal blow to any person, the

^a See the form of such power, Butl. note, 2 Co. Litt. 327. a. and 2 Bridg. Con. 8, 10. 469. 575. and Appendix I.

^v See Appendix II. 1.

Bridg. Con. 304. also Nicolls v. Sheffield, 2 Bro. Cha. Ca. 215. Doe v. Heneage, 4. Term Rep. 13. Stanley v. Stanley, 16 Ves. 491.

^w 1 Co. 87. a.

use shall cease as to him, and remain over; SECT. IV.
 this is fraudulent to prevent an escheat, and Of limitations of uses which agree with the rules of the common law.
 therefore void^y.

V. However, in some cases the manner of SECT. V.
 creating and limiting estates has undergone Of limitations of uses, and creation of legal estates by the statute, which differ from the rules of the common law.
 considerable alterations since the introduction of conveyances to uses.

(1.) It was absurd, that a man should
 make a conveyance, or give possession by Of uses limited to, and legal estates vested in, the grantor by his own conveyance.
 livery of seisin, to himself; and therefore if a
 feoffment had been made to a stranger and
 the feoffor, the stranger took the whole^z. But
 now, if a feoffment be made to the use of the
 feoffer, or to the use of the feoffor and a
 stranger, it is a good limitation of the use,
 and the statute executes it in the feoffor alone
 in the first instance, and in him and the
 stranger in the second. As this manner of
 limiting the use to, and vesting the legal
 estate in, the feoffor, releasor, &c. by one and
 the same conveyance, is quite contrary to the
 simple mode of conveyancing adopted by the
 common law, so it is the more convenient
 and the less expensive method. Thus, for
 example, it frequently happens, that upon
 the death or removal of trustees, it becomes
 necessary to fill up their number pursuant to
 a power for that purpose usually introduced

^y Moor, 633. 3 Atk. 180.^z Perk. s. 203.

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into settlements of real property. In order to effect this, it is now the practice for the old trustees to make a conveyance, which operates by way of transmutation of possession (generally by lease and release) unto the new trustees and their heirs, to the use of the old and new trustees and their heirs^a. Without the assistance therefore of the statute of uses, it would have been necessary in the above case, that the old trustees should have first enfeoffed A. B., who would have re-enfeoffed the old and new trustees jointly; thereby making two conveyances necessary. Indeed, in the case of terms of years and other personal property, two assignments are still required for the above purpose^b.

As a man could not at common law convey to himself, so neither could he make a conveyance to his wife^c; but by limiting a seisin to the feoffee, releasee, &c. he may declare the use to his wife, which use will be executed by the statute^d.

This method of vesting the legal estate in the grantor by his own conveyance can be effected by a feoffment, fine, recovery, or lease

^a See precedents, 1 Moyse v. Gyles, 2 Vern. Horsm. 319. 334 to 343. 385. Lucas v. Lucas, 1

^b See a precedent, 1 Atk. 271. note 2. last Ed. Horsm. 303 to 307. ^d Co. Litt. 112. a.

^c Co. Litt. 3. a. 114. a

and release; for in each of these, the seisin is conveyed to the feoffee, &c., and that seisin is sufficient to serve uses declared to the feoffor, &c., or to any other person. But in a bargain and sale, where the use first passes, and then the possession is executed in the bargainee by the statute, no other use can be declared upon his estate; according to the rule, that a use cannot be limited to arise out of a use^e. And yet a man may covenant to stand seised to the use of himself.

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(2.) By the common law a man could not make his own heir a *purchaser*, even of an estate *tail*^f. This maxim was indeed a necessary consequence of the preceding rule, that a man could not convey, nor limit a remainder to himself; for *filius est pars patris*^g — *hæres est pars antecessoris*^h. Therefore if a gift had been made in tail or for life, with remainder to the heirs made of the body of *male* the grantor, this remainder would have been voidⁱ. But since the introduction of uses, a man may limit the use, so as to make his heirs *special* take either by *purchase* or by *descent*. Thus, if J. S. make a feoffment to A. in fee, to the use of himself for life, with remainder to the use of the heirs of his body; this is a

Of uses limited to the heirs of the body of the grantor, so as to take by descent or purchase.

^e Dyer, 155. a. b. 1 Co. 136. b. 137. a.

^h Co. Litt. 22. b.

^f Co. Litt. 22. b.

ⁱ Greswold's case, Dy. 156. a.

^g Moor, 720. Dyer, 9. pl. 20.

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good estate tail executed in J. S.^k. So if the use be limited to A. for life, with remainder to the heirs of the body of J. S., in this case also the heirs of the body will take by *descent*^l: for as the limitation to A. for life *may* determine during the life of J. S. (the grantor), the law implies a use in J. S. for life, expectant upon the determination of the estate of A.; according to the principle, that so much of the use, as is not disposed of, results to the grantor; and this implied estate in J. S. for life in remainder, is sufficient to consolidate with the limitation to the heirs of his body; pursuant to the rule, that where there is a limitation to the ancestor for life, with a limitation to his heirs, or heirs of his body, in the same conveyance, the heirs, or heirs of the body, do not take by *purchase*, but by *descent*^m. But if a feoffment be made to the use of A. and his heirs *during the life of the grantor*, with the remainder to the use of the heirs of the body of the grantor; as the use is expressly limited away during the life of the grantor, there can be no *implied* estate in him, so as to consolidate with the limitation to the heirs of his body, and therefore his issue must in that case take by *purchase*ⁿ.

^k Co. Litt. 22. b.

^l See Wills v. Palmer, 5 Burr. 2615. 2 Black. 687.

^m See Fearn, 54 to 62. 4th ed.

ⁿ Tiffin v. Cosin, Carth. 272. 4 Mod. 380. Else v. Osborne, 1 P. W. 387. See Fearn, 62.

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But a grantor cannot even under a conveyance, which operates by way of *use*, enable his heir *general* to take a remainder as purchaser, under a limitation to his *heirs*; but where the limitation is to the right heirs of the grantor, the use so limited, is construed to be the *old* use, and will be executed in him as the *reversion in fee*, and not as a *remainder*^o. Thus if a fine be levied to the use of the wife of the conuzor for life, remainder to the use of another in tail, remainder to the use of the right heir of the conuzor; the last limitation of the use is void as a *remainder*; for the *old* use of the fee continued in the grantor as a *reversion*^p. So where a feoffment was made to the use of the feoffor for 40 years, without impeachment of waste, and afterwards to the use of C. his second son in tail male, with remainder to the use of the right heirs of the feoffor; it was determined, that the use limited to the right heirs was the *old* use; that it was void as a *remainder*, and was merely the *reversion*^q.

Of limitations of uses, and creation of legal estates by the statute, which differ from the rules of the common law.

^o See 1 Co. 129. b. 130. a. Godolphin v. Abingdon, 2 Atk. 57. This must be understood with the qualification, that the heir general may take under a limitation as a purchaser in the shape of a contingent remainder, as a limitation to such person, as at the time of the determination of the particular estates, shall be the right heir. See Marquis of

Cholmondely v. Lord Clinton, 2 Jacob and Walker, 1.

^p Fenwick v. Mltford, Moor, 284. 1 Leon. 182. Co. Litt. 22. b. Read v. Errington, Cro. Eliz. 321. S. C. Semb.

^q Earl of Bedford's case, Moor, 718. 1 Co. 130. a. Cro. Eliz. 334. Har. Co. Litt. note 3. 22. b. Bingham's case, 2 Co. 91. b.

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The difference is material. The grantor taking the limitation to his *right heirs*, as a *reversion*, it is his property, and he may *grant* or *devise* it. But if the *right heir* took as a *purchaser*, the *remainder* would belong to *him*, and the grantor himself would be excluded^c.

Sir Francis Bacon has observed, “that the
“very letter of the statute doth take notice
“of a difference between an use in *remainder*
“and an use in *reverter*; which though it
“cannot be properly so called, because it
“doth not depend upon particular estates, as
“remainders do, neither did they before the
“statute draw any tenures, as *reversions* do;
“yet the statute intends, that there is a dif-
“ference, when the particular use and the use
“limited upon the particular use, are both
“*new* uses; in which case it is a use *in re-*
“*mainder*; and where the particular use is a
“new use, and the remnant of the use is the
“old use, in which case it is a use *in re-*
“*verter*.”

Of limiting the use by the *habendum* to a person not named in the premises.

(3.) Again: by the common law, generally speaking, no person could take a present interest by the *habendum* of the deed, who was not named in the premises^d. But in a

^c “Lands granted by A.
“by fine, for the life of A.,
“remainder to A.’s right
“heirs. It is a reversion in
“A., and he may grant it.”
Note 3. Har. Co. Litt. 22.
b. See Jenk. 248. pl. 38.
and ante 64. in note.

^e Bac. Uses, 45, 46.

^d 2 Roll. Ab. 67. Hob.
313. note 4. Har. Co. Litt.
26. b. But see Spry v.
Popham, 3 East, 115.

case^a, where A. enfeoffed B., habendum to the said B. and C. their heirs and assigns, to the use and behoof of the said B. and C. their heirs and assigns; it was resolved, that as C. was not named in the premises, he could take no *possession* originally by the habendum; and that the livery, made according to the intent of the indenture, did not give any thing to C., because as to him it was void; but though the feoffment did not give any *seisin* to C., yet it did to B. and his heir, which *seisin* was sufficient to serve the use declared to C. Therefore the use limited to B. and C. was good, and the statute executed it. But this limitation of the use in a bargain and sale to a person not named in the premises, after a previous disposition of it to the bargainee, would be void, for the reasons before mentioned.

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(4.) So it is a rule of law, that if an estate be conveyed to two, the one being capable, and the other incapable, at the time of the grant, he who is capable shall take the whole^a; and that *joint tenants* cannot take at different periods^b. But since the introduction of uses, if A. make a feoffment in fee, to the use of B. and his wife, that shall be; though the

Of uses limited to two, the one being incapable.

^a Samme's case, 13 Co. 55. See as to an *exception* after an estate limited by way of use, Tregmiel v. Reeve, Cro. Car. 437.

^a 1 Co. 100. b. 2. 13 Co. 57.

^b Co. Litt. 9. a. 188. a. 2 Roll. Ab. 417. pl. 8.

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whole estate will vest in B. at first, yet upon his marriage the wife shall take jointly with him^c. So if a disseisin be had to the use of two, and the one agrees to it at one time, and the other at another, they shall be *joint-tenants*^d.

Of uses limited in future, and to persons not in esse, where no particular estate is expressly limited

(5.) No estate of freehold can by the common law be granted to commence *in futuro*^e; neither can a contingent remainder be supported without an express particular estate of freehold. Therefore, if a grant be made to B. and his heirs to commence four years after the grant, or to A. for years, with remainder to the right heirs of J. S. who is living^f, in either case the grant is void. But if a conveyance be made to J. S. for life, with remainder to the first son unborn, or right heirs, of J. D.; or if a feoffment and livery be made to J. S. for ten years, with remainder to J. D. and his heirs; in these cases the intervening estates are sufficient to support the remainders. Now in conveyances to uses, the courts have supported these future limitations, when no particular estate has been created, either in the shape of remainders, or as springing uses^a. Thus, if a man covenant

^c Mutton's case, Moor, 96. Dyer, 274. b. 1 Co. 101: a. Samme's case, 13 Co. 57. See Wells v. Fenton, Moor, 634. Stratton v. Best, 2 Bro. Ch. Ca. 233.

^d Co. Litt. 183. a. 13 Co. 57.

^e Barwick's case, 5 Co. 94. b. 2 Vent. 204. Roe v. Tranmer, 2 Wils. 75.

^f Co. Litt. 217. a.

^a See 1 Atk. 586.

to stand seised to the use of the heirs of his own body^b, or to the use of another after his own death^c, or if he bargain and sell his lands after seven years^d; in each of these cases the grant is good, and until the event takes place, the use results. But in conveyances operating by way of transmutation of possession, it is necessary, that a present seisin should be transferred in order to serve the resulting use. Thus if a feoffment, or lease and release, be made to J. S. and his heirs, to the use of J. S. and his heirs, to commence four years from thence, or after the death of the grantor^e, the limitation of the use to J. S. is good, for during the four years, or the life of the grantor, it will result and be executed. But if the conveyance had been to J. S. and his heirs after the death of the grantor, to the use of J. S. and his heirs; it would have been void; because it is the grant of an estate of freehold to commence *in futuro*^f.

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When a feoffment is made to A. and his heirs, to the use of the heirs of the body of the grantor, the limitation to the heirs of the body takes effect upon the death of the gran-

^b Carth. 263. See 22 Vin. 283. pl. 2. and the cases collected in the note.

^c Osman v. Sheafe, 3 Lev. 370. Roe v. Tranmer, 2 Wils. 75.

^d Bac. Uses, 63.

^e See 2 Salk. 675. and the above cases.

^f Roe v. Tranmer, 2 Wils. 75. Lamb v. Archer, 1 Salk. 225.

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tor, not as a springing use, but as a remainder; and the use resulting to the grantor for his life by way of particular estate, the grantor, by the union of the particular estate and the remainder becomes tenant in tail in possession^g. If the whole fee had resulted to the grantor, the heirs of his body would have taken, as purchasers, by way of springing use: but the decision is formed upon the true construction of the statute of uses; that so much of the use, as the grantor has not disposed of, and no more, results to him.

But in other cases, not substantially differing, as it appears to me, in principle, from the above, another construction is said to have been established. In *Davies v. Speed*, 2 Salk. 675. the chief justice held, “that a feoffment to the use of A. and his heirs, to commence four years from thence, was good as a springing use, and that the *whole* estate remained to the feoffor in the mean time; so it is, if it were to commence after the death of A. without issue, if he died without issue in twenty years.” This doctrine is assumed by others^h; but it does not appear

^g 1 Roll. Rep. 240. 22 Vin. 283. and the cases cited in note, pl. 2. and 2 Freem. 235. pl. 307. 258. pl. 326. Ante 101, 102.

^h See Pollex. 30. in the case *Weale and Lower*; and

the case of *Carwardine v. Carwardine*, *Fearne by Butler*, 388. In the case of *Pybus v. Mitford*, 1 Ventr. 379. Hale, chief justice, says, “so if he covenants to stand seised to the use

to have been considered with any degree of attention. Bacon (63,) expressly says, “ If I bargain and sell my land after seven years, the inheritance of the use only passeth; and there remains *an estate for years* by a kind of subtraction of the inheritance;” and this seems to be the proper construction of the statute.

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Of limitations of uses, and creation of legal estates by the statute, which differ from the rules of the common law.

In the case of *Davies v. Speed*, before noticed, a husband and wife, seised in right of the wife, convey by fine and deed to the use of the heirs of the body of the husband on the wife begotten; and for default of such issue, to the use of the right heirs of the husband. They had issue, which died in the lifetime of the husband and wife. The wife dies; then the husband dies; and the question was, whether the limitation to the right heirs of the husband was good? According to Salkeld’s report of this case, it is said to have been determined; first, that no estate for life resulted to the *husband*, because the estate belonged to the wife; “ secondly, this limitation *to the heirs of the body* of the husband, &c. “ was merely void; for taking it as a remainder, there is no precedent estate of freehold

“ of J. S. after 40 years, “ there is a fee-simple determinable in the covenantor. This is intelligible; for till the expiration of the term of 40 years, the covenant does not take effect. Until that period, there is not any seisin to a use. See also 1 Leon. 194.

SECT. V. “ to support it ; and taking it as a springing
 Of limitations “ use, then it is a springing executory use to
 of uses, and cre- “ arise after a dying without issue, which the
 ation of legal “ law will not expect.”
 estates by the
 statute, which
 differ from the
 rules of the
 common law.

There is a manifest error in this report of the second resolution, by referring to the limitation to the heirs of the body of the husband and wife, instead of the limitation to the right heirs of the husband ; for the question was, whether the limitation to the right heirs of the husband was good ; and unless the resolution is taken with reference to that limitation, then the observation, “ taking it “ as a springing use, then it is a *springing* “ and *executory* use to arise *after a dying with- out issue*,” would not have been applicable.

Springing uses. But the conclusion in that case, that the limitation to the right heirs of the husband was void as a springing use, is not very intelligible. A springing use indeed, to take effect after a general dying without issue, where it is not preceded by an estate tail in the issue, is, no doubt, illegal ; but that was not the case in *Davies v. Speed*. Admitting, in that case, that the use did not result to the wife and her heirs by way of particular estate so as to support the limitation to the heirs of the body of the husband and wife as a contingent remainder, still the limitation to the heirs of the body might have been good as a

springing use, to take effect upon the decease of the husband; and if that limitation had taken effect, there could have been no objection to the limitation to the right heirs of the husband, either as a remainder expectant upon, or as a springing use to take effect after, the estate tail^a; for in either case a recovery by the tenant in tail might have destroyed it; and if the limitation to the heirs of the body did not take effect, then the limitation to the right heirs of the husband, must of necessity have taken effect upon his death, and therefore not within the reasons of a perpetuity. The limitation, as it appears to me, to the right heirs of the husband, might, according to the event, have taken effect, either as a remainder, or as a springing use; and during the life of the husband, or the suspense of the contingency, it was uncertain in which way. If there had been at the death of the husband, any person answering the description of heir of the bodies of husband and wife, such heir could have taken an estate tail under the springing use to him, with a vested remainder to the right heirs of the husband; but if there had been no person answering that description at the death of the husband, then the limitation to his right heirs might have been good as a springing use: as a remainder, therefore, ~~or~~ take effect

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^a The words would have created an estate tail. See Mandeville's case, Co. Litt. 26. b.

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Of limitations
of uses, and cre-
ation of legal
estates by the
statute, which
differ from the
rules of the
commonlaw.

after an estate tail, it would have been good :
and it would have been valid as a springing
use to arise upon the decease of a person *in*
esse.

In the case of *Adams v. Savage*^b, where
lands were conveyed by lease and release to
trustees and their heirs, to the use of A., the
releasor, for ninety-nine years, if he should so
long live, remainder to the use of the trustees
for twenty-five years, remainder to the use of
the heirs male of the body of A., it was de-
termined, that no use for life resulted to A.,
and consequently, that the remainder to his
heirs male was void, there being no freehold
estate previously limited to support it.

If the above limitations had been in a will,
instead of a deed, the limitation “to the heirs
“male of the body of A.,” would have been
good, as *an executory devise*^c; and there does
not appear to be any satisfactory reason, why
that limitation, in the case cited, should not
have been supported, as a springing use. But
it is singular, that the court did not, either in
this case, or in the case of *Rawley v. Hol-*
land^d, consider the limitation upon the doc-
trine of springing uses : they determined, that
the limitation was void, as a remainder; but

^b 2 Salk. 679. Lord Raym.
854.

^c *Harris v. Barnes*, 4 Burr.

2157. *Gore v. Gore*, 2 P.
W. 28.

^d 22 Vin. 189. pl. 11.

they did not, it should seem, advert to the circumstance, that it might have been good, as a springing use^e.

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Probably the fact is, that at the time when the cases of *Adams v. Savage*, and *Rawley v. Holland*, were determined, the limitation, in each of those cases, “to the heirs male of the body,” was considered as too remote, even if it had been an *executory devise* under a will: in the one case, the limitation being to take effect after a life in being, and a term of twenty-five years; and in the other, after a life in being, and a term of 200 years: for it does not appear to have been settled, until the case of *Gore v. Gore*^f (1722), that the *freehold* might become vested under an *executory devise*, although such *freehold* estate were preceded by a term of 200 years, or upwards. The case of *Adams v. Savage* was determined in 1701, and *Rawley v. Holland* in 1712.

(6.) It is a maxim of the common law, that no estate can be limited upon a fee-simple; or, in other words, an estate in fee-simple cannot be made to cease as to one, and take effect by way of limitation, upon a con-

Of springing or shifting uses after or upon a limitation in fee.

^e Sergeant Hill, in a MS. note to *Adams v. Savage*, Salk. 679. makes a query, “If this would not be as

“good as a springing use, “as it would in a will be a “good executory devise.”

^f 2 P. W. 28.

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tingent event, in favour of another person. Thus if a feoffment had been made in fee, with a proviso to make it cease as to the feoffee, and go over to a stranger upon the payment of a certain sum, &c., this limitation was void^g. For as a remainder it could not take effect; a remainder being a *remnant* of an estate in lands or tenements expectant upon a particular estate^h: and as a condition it was void, for no person can take advantage of a condition, but the grantor and his heirsⁱ. But it is established now beyond controversy, that limitations of the above nature may take effect by way of use.

The principle seems to have been acknowledged at a very early period. In Brooke's Abridgment^k, it is admitted, that if a man make a feoffment in fee to the use of W. and his heirs, until A. pays a certain sum to W., and then to the use of A. and his heirs; the use is first executed in W. by the statute; but when A. pays the money, the use upon such payments shifts from W., and vests in A. But in that case (which was determined before the rule was clearly settled, that all future or

^g See Co. Litt. 18. a Seymour's case, 10 Co. 97. b. 1 Salk. 231. pl. 9. Dyer, 33. a. 1 Co. 85. b. 10 Mod. 423. Plowd. 29.

^h Co. Litt. 143. a. See Fearn, 8. 4th ed.

ⁱ Doctor and Stud. Dial. 2. c. 20, 21. Perk. s. 331. Litt. s. 347.

^k Bro. Feoff. al. Uses, pl. 30. cites 6 Ed. 6. B. N. C. pl. 423.

springing uses must be served out of the seisin of the grantees), it was said, that, to avoid all doubts, A. should enter in the name of the feoffees, and in his own name.

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So where a fine was levied to the use of A. and his heirs, if R. should not pay a certain sum to A. at an appointed time, and if he should, then to the use of A. for life, remainder to the use of R. in fee; upon the payment of the money it was held, that the uses would change according to the limitation¹.

It seems, that a shifting or springing use, after a previous limitation of the fee, cannot be barred by the cestuique use by any kind of conveyance. Thus, if land be given to the use of A. and his heirs, until B. pay him 10*l.*, and then to the use of B.; A. cannot bar this contingent use^m. A contingent, or shifting use, in this respect differs from a contingent remainder, which may be destroyed: but it agrees with an executory devise after a previous devise of the fee; as it was determined in *Pells v. Browne*ⁿ. However^o, if a man

Whether a shifting use, after a limitation of the fee, can be barred.

¹ See *Spring v. Caesar*, 1 Roll. Ab. 415. pl. 12.—For other instances of springing uses after a previous limitation of the fee, I must refer to the cases of *Harwell v. Lucas*, Moor, 99. and *earl of Kent v. Steward*, Cro. Car. 358.

^m *Lloyd v. Carew*, Prec. Cha. 72. Pig. Rec. 134. Palm. 132. 135. Vide Bro. Feoff. al. Uses, pl. 50. B. N. C. 137.

ⁿ *Cro. Jac.* 590. 1 Eq. Ab. 187.

^o *Wood v. Reignold*, Cro. Eliz. 764. 765. 854. Cases

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covenant to stand seised to the use of himself in fee, until marriage, and then to the use of himself and his intended wife, and the heirs of his body, with remainders over; he may before marriage destroy the future or contingent uses, by making a feoffment in fee, in tail, or for life, upon a good consideration, and without notice: but a lease for years would not destroy it, although it would bind the future use^p.

We may reconcile the last case to the preceding rule in this manner; if the seisin, out of which the springing or future use is to arise, be destroyed, the future use cannot take effect: therefore if A. covenant to stand seised to the use of such a wife, as he shall hereafter marry; until the marriage the use results to himself in fee, and it is out of his seisin, that the use to the wife must arise: now if he destroy that seisin before the use comes *in esse*, the use consequently cannot be served^q. But if A. make a feoffment to B. in fee, to the use of C. in fee; but if D. pay so much money, then to A. in fee; here if C. (who has the legal estate since the statute) make a feoffment, suffer a recovery, or levy a

collected in note to pl. 4. 22 Vin. 225. and pl. 1. 224. See also Gilb. Uses, 125.

^p See Bould v. Wynston, Cro. Jac. 163. Sed contra Semb. Barton's case, Moor,

742. as to the lease for years.

^q The case in B. N. C. 137. which is contra, is denied to be law. 2 Sid. 98.

fine, the use to A. is not barred from taking effect; because that shifting use is served out of the seisin of B. the feoffee, and not out of the estate of cestuique use. But it appears to me, that if in this case B. (the feoffee) should join with C. in making a feoffment, the seisin, or *scintilla juris*, of B. would be completely destroyed, and in that case no future use could arise to A. Indeed, if it is admitted, that there is a possibility of seisin remaining in the feoffee, to serve the contingent uses, it will follow that it may be destroyed by release or feoffment.

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Brent's case^r was in effect thus: R. B. made a feoffment to the use of himself and D., his wife, for their lives, with remainder, if R. B. survives D., to the use of such woman as R. B. should afterwards marry, for her jointure; remainder to the use of J. S. in fee.

J. S. and the feoffees, with the consent of R. B., join in a feoffment to other uses; and then R. B. levies a fine to the same uses, and marries a second wife.

The question was, whether the contingent use to the second wife was not destroyed by the feoffment of J. S. and the first feoffees? It appears, that the point was not judicially

^r 17 Eliz. 2 Leon. 14. Dyer, 339. pl. 48.

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determined: but in *Dillon v. Freine*, Poph. 76. Anderson says, "And for *Brent's* case, I " have always taken the better opinion to be, " that the wife cannot take in the case for " the mean disturbance, notwithstanding the " judgment, which is entered thereupon, " which was by the assent of the parties:" and in *Woodliff v. Drury*^s, which was the case of a feoffment before marriage, to the use of the feoffor and his intended wife after the marriage, and the heirs of their bodies (no use having been limited until the marriage): all the justices held, " that although " the feoffor be seised in fee until the marriage, yet by the marriage the new use shall " arise, if there be no act in the mean time " to destroy the future use, as in *Chudley's* " case."

The argument in *Perrot's* case^t appears to me very satisfactory; " a disturbance, which " will impede the future use, ought to arise " on the part of the feoffees; as if an alien is " enfeoffed to a use", upon office found, the " use is destroyed per 11 *Regin.* *Dyer*, fol. " 283., in the case of the *King v. Jasper*; or " if one, who had committed treason or felony, is enfeoffed to uses, and afterwards is " attainted, the use is destroyed^v: and that

^s Cro. Eliz. 439.

^u Bacon, *Uses*, 59.

^t Moor, 368. 390. 391.
pl. 506. 36, 37 Eliz.

^v Ibid. 58. 59.

“ was the case of *Francis Throckmorton*, who
 “ was attainted for treason in the 26th Eliz.:
 “ he was conuzee in a fine to the use of Mrs.
 “ Scudamore, his sister, for her jointure, and
 “ that was after the treason committed, but
 “ before the attainder; and after his at-
 “ tainder, his sister sued to the queen, who
 “ granted to her the land by the advice of
 “ *Monsieur Plowden, et divers autres de grand*
 “ *learning in le ley.*”

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“ So if the feoffees, before the future use
 “ shall arise, disable themselves from being
 “ seised of the land by their *feoffment*; as in
 “ Chudley’s case.”

“ And so 17 Eliz. Dyer, 340. (*Brent’s*
 “ case), where the use was limited to such
 “ woman as he should marry, and before mar-
 “ riage he requires his feoffees to make another
 “ feoffment over: in these cases the future
 “ use is prevented (*p̄vent*) by the opinion of
 “ the greater part of the judges who argued
 “ the case of *Dillon v. Friene*.”

“ And so it seems, if the feoffees had been
 “ barred of seisin by collateral warranty, or
 “ the like.”

(7.) It is a maxim of the common law, that every remainder must be limited, so as to await the determination of the particular

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 upon, or after, a
 previous limita-
 tion in tail or
 for life.

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estate, before it can take effect in possession^w. Therefore if an estate be limited to a person in tail, or for life, with a condition for making it cease upon an event, which may happen before its regular determination, this condition is void: for it cannot operate as a remainder for the reason just stated; and as a condition to vest the subsequent limitation by the entry of the grantor, it can have no effect; for supposing the grantor to enter for a condition broken, such entry would avoid the first livery, and of course destroy the remainder, which was created by that livery. But it is now clear, that if a seisin in fee be limited to J. S. to the use of A. in tail, or for life, provided that if B. return from Rome, then the lands shall remain to the use of C. in fee; the limitation to C. will vest in abridgment of the estate limited to A^x.

Of the distinction between shifting uses and conditional limitations.

It appears to me, however, that limitations of the nature just mentioned, which operate, so as to determine the preceding particular estate, before its regular expiration, can be effected without the aid of springing or shifting uses, and that by a species of limitation, which is not properly a remainder, nor condition, but which is distinguished by the name of a *conditional limitation*^y: an expres-

^w Plowd. 24. Fearne, 9. 390. 394. Cogan v. Cogan, Cro. Eliz. 360.

^x See 2 Leon. 16.

^y See Reeves, 4 vol. 509, 510. Plowd. 27. 32. 34. 414.

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sion and idea, as Mr. Douglas has in my opinion properly said^z, originally adopted to evade the necessity of the entry by the heir for the purpose of taking advantage of the defeazance of a prior estate. In order to distinguish between springing uses, and conditional limitations, I must observe, that where the grantor parts with the whole fee, and limits the use upon the seisin so transferred to B. in tail, or for life, until C.'s return from Rome, and then to the use of C., &c.: this limitation to C. is termed a springing or shifting use. But where the grantor only parts in the first intance with an estate less than the fee, the estate so created may be defeated by a *conditional limitation*; and upon the determination of it, the next subsequent estate immediately become vested without entry or claim^a. But in these cases it is necessary to use words of limitation; which words^b are, *quam diu, dummodo, dum, quousque, durante*; whereas, words of *condition* are, *sub conditione, ita quod, si contingat, proviso*. If words of *condition* are inserted, then the particular estate cannot cease without entry by the grantor or his heirs.

Thus if there be tenant for life, with remainder in fee, *upon condition* that tenant for

^z Dougl. Rep. 727. note

^b Mary Portington's case,

1. See Shep. Touch. 150. 10 Co. 41. b.

^a Co. Litt. 214. b.

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life (being a *feme sole*) should continue unmarried, and she afterwards marry; though the heir of the grantor may enter, yet by such entry he defeats the remainder^c. But if an estate be granted to A. *so long* as she shall continue unmarried^d, or to A. *for life, si tam diu in pura viduitate viveret*^e, and the remainder be granted to B.; upon the marriage of A. her estate determines by the nature of its limitation, and the remainder to B. immediately takes effect^f. So if a gift be made in tail to A. *upon condition*, that if C. return from Rome, it shall thenceforth immediately remain to B.; in this case the limitation over can never take effect as a remainder; because the estate tail cannot cease without an entry by the grantor or his heirs, which entry would defeat the remainder^g. But if a feoffment be made to A. and the heirs of his body *until* C.'s return from Rome, and after C.'s return, to B. in fee; here, upon C.'s return, the limitation to B. will vest^h.

But when limitations operate by way of shifting or secondary uses, they take effect,

^c W. Jones, 58. See also Plowd. 29.

^d W. Jones, 58.

^e Co. Litt. 214. b.

^f See 2 Black. Com. 155. W. Jones, 58. in Foy v. Hynde, 5 Vin. 63. pl. 13. and note. Mr. Fearn considers the limitation over as a *remainder*, and not as a

conditional limitation. 1 Vol. 393. 4 Ed.

^g Co. Litt. 214. b. W. Jones, 58. Plowd. 413.

^h W. Jones, 58. See vide Shep. T. 121. contra. But the authorities there cited do not support his position.

whether the words, which cause their taking effect, be words of *limitation* or *condition*ⁱ. Thus, where a fine was levied to the use of B. in fee, *upon condition* that he should pay A. (who was the conuzor) 4l. per annum, and in default of payment to the use of A. for life; it was said, that as this was limited to the conuzor, it was a *condition*; but if it had been limited to a stranger, it would have been a good *springing use* upon the non-performance of the condition^k. To prove this the case of Bracebridge was cited^l, which so far as relates to the present point was, that A., seised of the reversion of some lands, granted them to B. and C. and their heirs, *upon condition* to pay a certain sum on a particular day; and in default thereof to stand seised to certain uses. Default was made in payment, and it was held, that by virtue of the statute 27 Hen. 8. c. 10. the use was divested out of the grantees.

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Where an estate is limited to the use of A. in fee simple, subject to a springing use, no act of A. can destroy it, as I have before observed; but where an estate tail is limited, and a secondary or shifting use is limited upon it, the tenant in tail may by recovery

Tenant in tail may bar shifting uses.

ⁱ See 2 Leon. 16.

^k Smith v. Warren, Cro. Eliz. 688.

^l Moor, 99. pl. 243. S. C. by the name of Harwell v.

Lucas; 1 Leon. 264. pl. 355. S. C. 2 Leon. 221. pl. 281. And 113. S. C. 22 Vin. 251. H. a. pl. 3. and note.

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Of shifting or secondary uses arising upon the execution of powers.

bar the limitation over^m. Therefore, it is said, “If tenant in tail be with a limitation so long as such a tree shall stand, a common recovery will bar that limitationⁿ.”

(8.) I have noticed such shifting or springing uses as take effect, or arise, upon an event provided for by the deed, in which the original limitations, intended to be defeated thereby, are created. But there is a species of shifting or future use, which arises from the act of some agent or person nominated in the deed; and this is called a use, arising from the execution of a *power*. Every power of this kind is a power of revocation, and new appointment; for the new uses and estates created under the appointment, must necessarily (as to the extent of such appointment) revoke, defeat, or abridge the uses, which existed, and were executed, previously to the new limitation^o. Sometimes an express power of revocation is limited prior to the power of appointing new uses. But this is never necessary.

Powers of appointment.

Powers of appointment are adopted under various circumstances, and they may either by the express provision of the deed precede, or be reserved after, the limitation of uses in-

^m Page v. Hayward, 2 Salk. 570. Vide 1 Lev. 35. 1 Sid. 102. See Fearn 15, 16.

ⁿ In the case of Benson v. Hodson, 1 Mod. 111.

^o See 2 Vern. 511. Moor, 611.

tended to be executed subject to such powers.

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Thus an estate may be conveyed to J. S. and his heirs, to such uses as A. shall appoint, and in default of appointment, and subject thereto, to the use of A. and his heirs^p. But it is immaterial^q, whether the power actually precedes, or comes after, the limitation of the us to A. and his heirs. In a case^r where an estate was limited to the use of H. R. and his heirs, *and* to such uses as he should appoint by will, lord Hardwicke thought, that the word *and* must be understood disjunctively for the word *or*, in order to comply with the intention of the parties. But if a feoffment, or lease and release, be made to J. S. and his heirs, to the use of J. S. and his heirs, with a power of revocation reserved thereupon, such power is void; because J. S. is in by the common law^s.

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In conveyances to purchasers, the estate is sometimes conveyed to the purchaser and his heirs, to such uses as he shall appoint by deed or will, and in default of, and subject to, such appointment, to the use of the purchaser and his heirs. It is conceived, that a power of appointment so reserved cannot be exercised; for, subject to the power, the purchaser is IN

Power reserved upon a legal estate at the common law.

^p An appointment under a power of this kind would overreach the claim of the wife of the appointor to dower. See Ray v. Pung, 5 Barn. and Alders. 561.

^q See 4 Term Rep. 181.

^r Dobbins v. Bowman, 3 Atk. 408.

^s Co. Litt. 237. a. Shep. Touch. 525.

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by the common law; and it does not appear to me, that the reservation of the power before the limitation to the purchaser, can make any difference between this and the case stated by sir Edward Coke. A modern writer³, to whom the profession is indebted for several valuable works, seems to think, that in this case, in order to preserve the power, and to effectuate the intention of the parties, the releasee would be deemed to be in under the statute of uses. It would be difficult, however, to support that construction either upon principle or authority.

That upon a conveyance to A. and his heirs, to the use of him and his heirs, A. would take in the course of possession by the common law, and not by the statute of uses, is a point, I apprehend, settled beyond controversy. In *Gwam and Ward v. Roe*¹, a reversion was conveyed by fine to the conuzee and his heirs, to the *use* of the conuzee and his heirs; and the conuzee brings debt against the lessee: and it was objected, that no attornment of the lessee was alledged, as it ought to have been, “because the plaintiff “came in by the common law, and not by the “statute of uses—*quod fuit concessum*.”

In the case of *lord Altham v. the earl of Anglesey* (Gilb. Rep. in Ch. 17.) it is ex-

³ Sugd. on Pow. 117.

¹ Salk. 90, ante 91, 92.

pressly stated, that if a fine be levied to a man and his heirs, to the use of him and his heirs, in this case he shall take by the common law, and not by way of use: and the same doctrine is stated in *Long v. Buckridge*, 1 Strange, 111. and by Bacon 63.

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The seisin transferred to the grantee being clothed with the limitation of the use, there was no ulterior equitable interest known previously to the statute of uses: for the conveyance to the grantee gave the possession to him at the common law, and the declaration of the use to him invested him with the most extensive beneficial interest then existing. Any ulterior limitation or declaration of a use, or trust, is an equitable interest, arisen from the construction upon the statute of uses. It is not the use, which existed previously to that statute.

The question therefore is, whether a power of revocation and new appointment can operate upon a legal estate perfected at the common law? The authority of sir Edward Coke is decisive: "In case of a feoffment or other conveyance, whereby the feoffee or grantee is *in* by the common law, such a proviso were merely repugnant and void." The author of the *Touchstone*^v, by way of illus-

^u Co. Litt. 237. a.^v 525.

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tration of the case stated by Coke, says, "As
" where A. doth enfeoff B. and his heirs, to
" the use of B. and his heirs:" but the writer,
to whom I have alluded, seems to think, that
Coke had no such case in contemplation;
but alluded to a feoffment at common law,
and not by way of use. If there be any
meaning at all in the observation, he could
have contemplated no other case. If a feoff-
ment be made to A. and his heirs, it is neces-
sary, in order that he may obtain the legal
estate at the common law, that there should
be either a declaration of the use to him, or
a consideration paid by him to prevent a re-
sulting use to the grantor; so that although
a grantee may still have a legal estate at the
common law, the rule is grounded upon the
practice and construction of uses; and it is
to be presumed, that sir Edward Coke, who,
in the case stated, was explaining the opera-
tion of the statute of uses, understood the
principles, upon which a legal estate was
created at the common law.

It is however contended, that the grantee
having the use partially limited to him, may,
in some cases, take the legal estate by the
statute, and not at the common law; that this
construction is adopted to give effect to the
intention of the parties; and that the prin-
ciple of construction may be extended to the
case under consideration. If indeed intention

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is to be allowed at all upon the construction of a deed, it must be confined to those cases where the grantee to uses takes only a joint or partial estate under the limitation, the remaining use being limited to a third person; for in these cases, the use being limited to a certain extent to a third person, the words of the statute are satisfied; and courts of justice may possibly, in such cases, think it proper to mould the whole limitation under the statute, so as to meet the intention of the parties. But if a conveyance be made to A. and his heirs, to the use of him and his heirs, it can never be a question of intention, whether A. takes a legal estate by the statute, or at common law. He takes it at the common law by a positive rule of law, not raised from intention, but operating sometimes even against it, as in the case of a conveyance unto, and *to the use of*, A. and his heirs, to the use of B. and his heirs, in trust for C. and his heirs; in which the intention of the grantor would be manifest, that B. should take the legal estate, for otherwise he could not be a trustee for C.; yet clearly the legal estate would vest in A.; and it would, no doubt, be the same, notwithstanding the grantor had by a subsequent declaration expressed his intention, that B. should take the legal estate. In truth, this and the case stated by Sir Edward Coke, appear to me to be grounded upon the same established rule; that a use cannot be limited

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to arise out of the estate of a cestuique use, taking the legal estate at the common law; that a use cannot be limited upon a use, although the first use, being limited to the grantee, is not a use within the statute^w; and the two cases cannot in principle be distinguished. In the one case, the estate is conveyed to, and to the use of, A. and his heirs, to the use of B. and his heirs, and in the other to and to the use of A. and his heirs, subject to a power of appointment reserved to B.; and if in the case first mentioned, the use to B. cannot be executed in consequence of the seisin of A., being clothed with the use limited to him, upon what principle can the appointee of B. in the second, take a legal estate? Upon what rational distinction can the appointee acquire a legal estate under the limitation, effected by the exercise of the power, when, if the same limitation had been included in the deed itself, he would merely have taken an equitable interest?

I anticipate an observation upon this mode of reasoning. It may be said, that if a conveyance be made unto (not to the use of) A. and his heirs, to the use of B. and his heirs, to the use of C. and his heirs, although the use to C. being limited by the same conveyance, cannot be executed by the statute, be-

^w See this point before stated, 91, 92.

cause it is limited to arise out of the estate of *cestuique use*, yet by the exercise of a power of appointment reserved by the conveyance, the appointee may take a legal estate. The rule of law would be correctly stated; but the application of it to the case, which I have mentioned, would be erroneous; for by the exercise of the power, the use would arise out of the seisin of A., not previously clothed with a use. The analogy would be preserved by stating the case thus: If in a conveyance to A. and his heirs, to the use of B. and his heirs, a power of appointment is reserved either to A. or B., but so worded, that the use to take effect under the exercise of the power is to arise out of the legal estate of B., and not out of the seisin of A., the appointee under the power would not take a legal estate, because the use limited to him would arise out of the estate of B. the *cestuique use*. What difference can be discovered between the limitation of a use under a power to arise from the estate of *cestuique use* having the legal estate by the statute, and from the estate of *cestuique use* having the legal estate at the common law?

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In most modern marriage-settlements, powers of selling and exchanging are limited to the releasees; and powers of leasing*,

* See the form, Appendix III.

SECT. V. jointuring^y, and limiting terms for raising portions for younger children^z, are reserved to the tenants for lives. All these powers, by whatever words they are created, take effect by way of limitation of the use out of the original seisin of the feoffees, or releasees.

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Powers of leasing were frequent soon after the statute of uses. In a case, 42 Eliz.^a, a power of leasing is mentioned as a common thing; and it is there said, that the words usual in such powers were *to make leases or demise* for twenty-one years, or three lives; which words should be understood to limit the use; and that if a lease should be made in the words of a *demise*, it should enure as a limitation of the use for the term. It is observable, that the most early precedents of leasing powers enable the party to *lease* or *demise*^b; but the lease being nothing more than a limitation of the use, the words authorizing it should be, *limit and appoint* by way of lease or demise; and yet the old form of leasing powers is in this respect still preserved in the most approved modern precedents. I find however, among Bridgeman's precedents, several powers of this kind, in

^y Appendix IV.

^z Appendix V.

^a Moor, 611. See Leaper v. Wroth, cited 6 Co. 33. a.

Cro. Eliz. 5. 1 Leon. 35.

^b See West's Symb. s. 275. 1 Leon. 35.

which the words *limit and appoint* are expressly used^c.

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Sir Edward Coke states^d, that powers of revocation in *voluntary* settlements were frequent in his time. Thus if a man seised in fee, for the advancement of his blood, covenanted to stand seised to the use of himself for life, with remainder over, he would annex a power of revoking those uses. These powers, however, when reserved to the grantors or owners of estates, were, like the voluntary conveyances, in which they were reserved, made fraudulent, as against purchasers, by the 27th Eliz. c. 4^e. General powers

^c See 2 Bridg. Conv. 12. 17. 98. &c. So also as to powers of jointuring, *ibid.* 14. 17. &c.

^d Co. Litt. 237. a.

^e “ And be it further enacted by the authority aforesaid, that if any person or persons have heretofore, sithence the beginning of the queen’s majesty’s reign, that now is, made, or hereafter shall make, any conveyance, gift, grant, demise, charge, limitation of use or uses, or assurance of, in, or out of any lands, tenements, or hereditaments, with any clause, provision, article, or condition of revocation, determination, or alteration at his or their will or pleasure of such convey-

“ ance, assurance, grants, limitations of uses or estates of, in, or out of the said lands, tenements, or hereditaments, or of, in, or out of any part or parcel of them contained or mentioned in any writing, deed, or indenture of such assurance, conveyance, grant, or gift; (2.) and after such conveyance, grant, gift, demise, charge, limitation of uses, or assurance, so made or had, shall or do bargain, sell, demise, grant, convey, or charge the same lands, tenements, or hereditaments, or any part or parcel thereof, to any person or persons, bodies politic and corporate, for money or other good consideration paid or given

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of revocation have been long since disused in settlements, because, even when restrained by the consent of trustees, it has been doubted, whether they are not within the provision of that statute^f. A power was then introduced into settlements, whereby the prior uses were revoked, in case the grantor should *first* settle other lands of equal value to the same uses. This power, as Mr. Booth observes^g, was found inconvenient, because few people are in circumstances to buy new estates, till they have sold their old ones. The modern power of selling and exchanging, which is reserved to the releasees, answers every purpose^h.

Priority of powers.

So early as the time of Bridgeman's practice, a doubt seems to have prevailed as to

“ (the first conveyance, as-
“ surance, gift, grant, de-
“ mise, charge, or limita-
“ tion, not by him or them
“ revoked, made void, or
“ altered according to the
“ power and authority re-
“ served or expressed unto
“ him or them in and by
“ the said secret convey-
“ ance, assurance, gift, or
“ grant); (3.) that then the
“ said former conveyance,
“ assurance, gift, demise,
“ and grant, as touching the
“ said lands, tenements, and
“ hereditaments, so after
“ bargained, sold, convey-
“ ed, demised, or charged a-
“ gainst the said bargainees,
“ vendees, lessees, grantees,

“ and every of them, their
“ heirs, successors, execu-
“ tors, administrators, and
“ assigns, and against all
“ and every person and per-
“ sons which have, shall,
“ or may lawfully claim
“ any thing, by, from, or
“ under them, or any of
“ them, shall be deemed,
“ taken, and adjudged to be
“ void, frustrate, and of
“ none effect by virtue and
“ force of this present act.”
See Shep. Touch. 64.

^f See 2 Bac. Ab. 607. and Buller v. Waterhouse, T. Jones, 94. 3 Co. 82. b.

^g See opinion at the end of Hill, Shep. Touch.

^h See Appendix VI.

the priority and effect of powers of the above kind with reference to each other, when contained in the same settlement; and he therefore introduced a clause¹ in settlements, declaring, “that every of the said jointures, leases, grants, limitations, and estates, shall take effect and stand good, according as the said jointures, leases, grants, limitations, and estates shall in priority of time be made, one before the other, by force of any of the powers or provisoes aforesaid.” The qualification, however, so far as I have been able to ascertain, appears to have been subsequently omitted in most approved forms; thereby leaving the effect of the powers to the construction of law: but of late years, it has not been unusual to insert a proviso, declaring, 1st, that the power of leasing shall take precedence of the power of selling and exchanging, unless executed subsequently to it, in point of time; 2dly, that the power of selling and exchanging shall overreach every other power, although subsequently exercised in point of time; and 3dly, that in all other cases, the powers shall take effect according to the exercise of them in priority of time.

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Considering the nature and objects of powers of leasing, jointuring, charging for younger children's portions, and selling and

¹ 1 Bridg. Conv. 219. See 2 Bridg. Conv. 18. 102.

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ation of legal
estates by the
statute, which
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exchanging, I cannot satisfactorily discover the necessity or propriety of any explanatory declaration as to their priority; and it is to be feared, that these clauses have tended to create doubts, where none ought to have existed, and even to raise an erroneous opinion as to the effect of appointments made under the powers; for certainly it cannot be considered as an invariable rule, that, in the absence of an express declaration, the uses to arise under the execution of the powers will take effect according to the priority of execution.

The powers of jointuring and charging for younger children's portions are introduced with a view to benefit the immediate objects of the settlement by making a provision for those claiming under them as wives, or children. By the exercise of the power of leasing, or of selling and exchanging, the use is limited to a purchaser, who is not an immediate object of the settlement. The uses limited under the exercise of the former powers must be considered as limitations originally contained in the settlement for the benefit of the objects of it; but the estates created by the latter must necessarily, as to the extent of such estates, overreach the limitations of, and virtually supersede, the settlement itself.

The avowed object of a power of selling is to enable the donee of it to convey to a purchaser a title complete against the immediate objects of the settlement, and those claiming under them either as volunteers, or upon the consideration of marriage.

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If a sale or exchange, made under the execution of a power, revokes a jointure or provision for younger children, made by the settlement itself, it must, for the same reason, overreach a jointure or provision, created by the exercise of a power contained in such settlement. There is no rational distinction between the cases. In each, the jointure or charge will be secured upon the estate to be purchased or acquired in lieu of the estate sold or exchanged. Then with reference to the powers in each of the two classes above mentioned : first, when powers are reserved to a tenant for life, of leasing, selling, and exchanging, and of charging, not as a provision for younger children, but for raising a sum of money for his own use, the use or estate appointed by either of these powers, would vest in the appointee in possession ; and no subsequent act of the tenant for life could defeat his own previous appointment in favour of a purchaser. If the subsequent, could defeat the previous, appointment, the appointee under the previous appointment would not take an estate in possession, according to the

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express purport of the appointment^k. Secondly, if powers of jointuring and charging for younger children's portions, are reserved to a tenant for life, the priority of the execution of the uses under those powers, should be determined by the usage in limiting those estates by the settlement itself, by which the presumed objects of the parties may be inferred; and therefore a jointure under a power, should precede a charge made by the same tenant for life for younger children's portions, notwithstanding the latter may be executed previously in point of time; and although the jointure be made upon a second, and the charge created upon a first marriage.

Admitting the propriety of expressly declaring the intention of the parties, both of the qualifications, which I have abovenoticed, are imperfect and erroneous. The following plan seems less objectionable: in the power of sale, the releasees, or the tenant for life, may be empowered to revoke the uses limited by the settlement, and which may be limited by the exercise of any of the powers therein contained, except any lease made under the power of leasing, and subject and without prejudice to any sale or mortgage, which shall then have been actually made in consequence of the exercise of any of the powers;

^k See *Goodright v. Cator*, Doug. 477.

and in the power authorizing the tenant for life to charge for younger children's portions, it should be expressly stated, that the charge made under the power should be subject to the jointure limited by virtue of the power of jointuring reserved to the same tenant.

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With respect to the different kinds of powers, and the means of destroying or suspending them, the following observations occur.

Different kinds of powers.

Powers are either appendant, or in gross, or altogether collateral: appendant, when the exercise of them is in the first instance to interfere with, and, to a certain extent, to supersede the estate of the donee of such power; in gross, when they do not commence until the determination of the estate of the donee; and collateral, when the donee has no estate at all in the property, which is the subject of the power.

A power reserved to a tenant for life, to make leases in possession, is appendant; for, by the exercise of it, the term created by it necessarily precedes the estate of the tenant for life, to whom it is reserved. A power to a tenant for life to jointure, is a power in gross; for the jointure created by it must necessarily take effect after the death of the particular tenant.

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Where an estate is limited to the use of A. for life, with remainders over to other persons, and with a power of revocation and new appointment reserved to A., this power is both appendant and collateral. It is appendant as to the estate for life of A., and collateral as to the estates in remainder. So, if the use had been limited to A. for life, with remainder to B. in tail, with remainder to A. in fee, with a power of revocation and new appointment reserved to A., the power would be appendant as to the estate for life of A. and his remainder in fee, but collateral to the estate tail of B.

A power wholly collateral is reserved to a person having no legal estate in the property settled. As where an estate is limited in strict settlement, and a power is reserved to a stranger to revoke the existing uses, and limit new ones.

The division of powers into three classes above mentioned is adopted in practice, and is sufficient for all purposes. But the distinctions are not critically accurate; for all powers are in truth in some degree collateral; and the distinction has been raised rather to denote the person exercising the power, than the estate made subject to it, and to arise under its execution. Thus a power reserved to a tenant for life to make

leases in possession, although appendant to his own life estate, is collateral to the estate of the person next in remainder, so far as it arises out of such remainder. The terms therefore “appendant,” and “in gross,” arise from, or in consequence of, the estate of the person exercising the power; and the term “collateral,” in respect of the estate acted upon by the power.

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In practice, the cases of greatest interest arise upon the destruction of these powers; and it is necessary to attend to the above observations, in order to understand the grounds upon which powers may be destroyed, or rendered impossible to be exercised.

With respect to powers, so far as they are appendant, it may be considered as a principle, that the donee of a power shall not be allowed, by the exercise of such power, to defeat any charge, estate, or incumbrance, which he himself had previously made or created; and therefore, if a tenant for life, having a power of leasing, previously conveys his legal estate, the power of leasing, to the extent of such conveyance, will be defeated. So in the case mentioned of an estate being limited to A. for life, with remainder to B. in tail, with remainder to A. in fee, with a general power of revocation reserved to A., if A. by lease and release, not executed

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So the usual power of appointment, limited to a purchaser to prevent the dower of his wife from attaching upon the estate, must be considered as a power appendant. And therefore, if the purchaser afterwards convey the fee by lease and release, or any other conveyance, without having had recourse to the power, the power is extinguished.

In *Ren, lessee of Hall v. Buckley*, Doug. 292. 2nd ed. it was held that if a tenant for life convey his legal estate for life merely for the purpose of letting in a particular charge, this will not destroy a power of leasing previously reserved to him. But the authority of this case has been doubted^a. So, where a tenant for life, with a power appendant, conveys his life estate, and the old use is limited to him, the power, it should seem, is not destroyed.

It has been mentioned, that if there be tenant for life, with a power to make a jointure on an after-taken wife, or to make a

^a See Sugd. Pow. 59.

lease for years, to commence from his death, for the purpose of raising portions for his younger children, the power, in each of these cases, is in gross. "These powers," says lord Hale^a, "may by apt words be destroyed by *release*, or by a fine or feoffment^b, which carry away and include all things relating to the land : but an assignment of *totum statum suum*, or other alteration of the estate for life, does not affect such power." Therefore if a tenant for life convey by lease and release, or bargain and sale *in fee*, he does not destroy a power *in gross* reserved to him : for it is the nature of these conveyances to pass only what the tenant might lawfully convey.

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In 2 Roll's Abr. 263, pl. 2. it is said, that if an estate be limited to A. for life, with remainders over, and with a power for A. to revoke the uses and limit new ones, and if A. make a lease for life, the power, as to the fee, is suspended. (*Snape v. Turton* ; and see *Clarke v. Phillips*, 1 Vent. 42. Carth. 24. 2 Keb. 552.) Hence it has been inferred, that if the tenant for life, in a similar case, convey his life estate by lease and release, or bar-

^a See *Edwards v. Slater*, Hard. 410. 416. *Penne v. Peacock*, Ca. Temp. Talb. 41.

^b So by recovery. *Saville v. Blackett*, 1 P. W.

777. Note, the power in that case is erroneously called *collateral* ; whereas, according to the distinction before mentioned, it was *in gross*.

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gain and sale, such conveyance will suspend or defeat the power. But the authorities cited do not warrant this conclusion. They go only to this extent : that if A., tenant for life, with a power of revocation and new appointment, make a lease for *life*, the lease would suspend the exercise of the power of revocation; and this determination may be supported, I apprehend, upon principle; for it may be assumed, that the lease was made for the life of the lessee, and not of the lessor; and it may be assumed, that the lease was made by feoffment, which was at that time the usual mode of conveying the *freehold* by way of lease. Now the lease might continue, in point of duration, beyond the life of the lessor, and it being made by feoffment, it may be considered as having displaced the reversion, out of which the use to be created by the power, was to arise. But it is different, if A. by bargain and sale, lease and release, or grant at common law, conveys his life estate; for neither of these conveyances displaces the estates in remainder.

With respect to a power collateral; as where a feoffment is made in fee by A. to uses, with a proviso that of B., a stranger, shall revoke, the uses shall cease, the donee of the power cannot release it, and a fine levied, or feoffment made by him, will not extinguish it: for the person to be benefited

under the exercise of the power does not claim the estate from or under the donee, but under the original settlor. But if the donee of the power in this case, should acquire the fee-simple of the estate, the power would become unnecessary, and would be consequently extinguished.

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But when a collateral power, as a power of selling and exchanging, is reserved to the releasees or grantees to uses, there is supposed to be a *scintilla juris*, or possibility of seisin, remaining in them to serve the use arising under the execution of the power: and it should seem, that the power may be defeated by the previous release or extinguishment of the possibility of seisin. The destruction of this *scintilla juris* occasioned one of the objections to the title in *Wheate v. Hall*^a: for Sir Martin Foulkes, to whom the legal estate was devised by the will of Maximilian Western, jointly with Charles Callis Western, was surviving releasee to uses under the settlement of 1793, and he joined in conveying the legal estate to the uses of the settlement of 1805.

In the case of *Willis v. Shorrall*^b, lord Hardwicke held, that a power vested in a stranger to limit a term of years for raising a

^a 17 Ves. 80.^b 1 Atk. 474.

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sum of money upon a certain event, could not be destroyed by a fine levied by the person, who claimed the lands subject to the power; and indeed, it may be stated as a general rule, that the destruction of a power, if it be capable of being destroyed, must proceed from the donee of it, and not from the owner of the estate subject to its operation; for it would be absurd, that the act of the person, whose estate is to be overreached by the exercise of the power, and not being the donee of it, should be competent to destroy a power, which, in its original creation, was intended to supersede such estate. This seems to be clear in principle; but Holt, C. J. in *Page v. Hayward*, 2 Salk. 570. having stated generally his opinion, that a recovery will bar a condition or limitation collateral to the estate tail, for the destruction of which it is suffered, it has been contended, that a recovery will destroy a power, originally reserved with a view to defeat such estate tail. But a recovery has the effect of barring a collateral condition or limitation on the principle, that it bars all remainders expectant upon it; but it cannot affect a use precedent to the estate tail, of which the recovery is suffered; for the recoveror comes in, as of the estate of the tenant in tail, and subject to all charges, to which it is subject, and to all limitations preceding it.

The fallacy of the argument consists in considering the springing use under a power, as a limitation or remainder determining or narrowing the limits of the estate tail: but the use arises upon the exercise of the power by the effect of, or under, the original settlement. For instance, if instead of creating a lease or jointure under the power, the lease or jointure had been created by the settlement, it would be clear, that a recovery by a tenant of an estate tail subsequent to the lease or jointure, could not destroy such lease or jointure.

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Every power, so far as it is collateral, takes effect as a springing use under the conveyance, by which the power is reserved, superseding, or overreaching, the estates to which it is collateral. It does not properly determine an estate, like a remainder, or conditional limitation; but it substitutes another estate in lieu of it. Suppose lands limited to the use of A. for life, with remainder to B. in tail, remainder to C. in fee, subject to a proviso, that if a certain act be done within the compass of A.'s life, the uses limited to B. and C. should cease, and in lieu thereof, the use should be to D. in fee. It could scarcely be contended, that any act by the tenant in tail could defeat this springing use. It would not, in the sense in which the expression is used, determine the estate

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tail of B.; but it would prevent its taking effect in possession. It would substitute another estate, in lieu of the estate tail. A use taking effect under a power to be exercised by A. is, in substance, the same thing.

The late case of *Roper v. Halifax*, determined in June 1817, in the Common Pleas, has confirmed the above observations. In that case, by indentures of lease and release dated the 7th and 8th March 1788 (being articles executed previously to the marriage of Miss Catherine Castle with Edward Bouverie, Esq.), it was agreed, that certain freehold estates in Suffolk, Miss Castle's property, should be conveyed by her to John Thomas Batt and Everard Fawkener, Esqs. their heirs and assigns, to the uses following; (viz.) to the intent that the said Catherine Castle, during the joint lives of herself and the said Edward Bouverie, might receive a rent-charge of 300*l.* by way of pin-money; and subject thereto to the use of Frederick Robinson and John Crewe, their executors, &c. for a term of ninety-nine years, for securing it: with remainder to the use of the said Edward Bouverie for his life; remainder to the use of the said J. T. Batt and E. Fawkener, and their heirs, during his life, to preserve contingent remainders; remainder to the use of the said Catherine Castle for her life, with remainder to the use of the same

trustees during her life, to preserve contingent remainders ; remainder to the use of Edward Vincent and John Blake, their executors, &c. for a term of five hundred years, for raising portions for the younger children of the intended marriage ; with remainder to the use of the first and other sons of the intended marriage successively in tail male ; with remainder to the use of the said Edward Vincent and John Blake, their executors, &c. for a term of six hundred years, for raising additional portions for daughters in case of failure of issue male of the intended marriage ; with remainder to such uses, as the said Catherine Castle should appoint ; with remainder to the said Catherine Castle in fee. And in the same indenture of release it was further agreed, “ that in the “ said intended settlement there should be “ contained a power for the said J. T. Batt “ and E. Fawkener, or the survivor of them, “ or the heirs or assigns of such survivor, “ at any time or times, by and with the consent and approbation of the said Edward Bouverie, and Catherine Castle his intended wife, or of the survivor of them, to be testified in manner last therein before directed,” [viz. by any deed or deeds, writing or writings, under their hands and seals, or his or her hand and seal, to be executed in the presence of, and to be attested by, two or more credible witnesses,] “ from time to

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“the manors, hereditaments, and premises,
 “in the county of Suffolk, so agreed to be
 “settled and limited as aforesaid;” so as
 that the money to arise from the sale thereof
 should be laid out in the purchase of, and
 that the exchange should be made for, other
 manors, &c. ; and so as all the hereditaments
 and premises, so to be purchased and taken in
 exchange, should be immediately thereupon
 conveyed to the same uses, as the heredita-
 ments sold or exchanged were by the intended
 settlements to be limited and settled. And by
 the same deeds the said Catherine Castle con-
 veyed the same estates to the said J. T. Batt
 and E. Fawkenor, to the use of the said C.
 Castle and her heirs until the marriage; and
 then to the use of the said J. T. Batt and E.
 Fawkenor, their heirs and assigns; upon
 trust, when the said Edward Bouverie (who
 was then a minor) should make the settle-
 ment of his estates therein agreed upon to
 convey and settle the said estates thereby con-
 veyed, to the uses before stated. And in the
 said indenture of release is contained the
 usual power of appointing new trustees, by
 the said Edward Bouverie and Catherine
 Castle.

By indentures of lease and release, dated
 the 21st and 22d November 1788 (being
 the settlement made in pursuance of the above

articles), Mr. Bouverie duly conveyed his estates to such uses, as were agreed upon by the articles. And in the indenture of release of the 22d November 1788, the trustees conveyed Mrs. Bouverie's estates to the uses agreed upon by the articles; subject to the following powers of selling and exchanging :
 " Provided always, that it shall and may
 " be lawful to and for the said J. T. Batt and
 " E. Fawkener, or the survivor of them, or the
 " heirs or assigns of such survivor, with the
 " consent and approbation of the said E.
 " Bouverie and Catherine his wife, or of the
 " survivor of them, to be testified in manner
 " hereinbefore directed," [viz. by any deed or
 " deeds, writing or writings, under their hands
 " and seals, or his or her hand and seal, to be
 " executed in the presence of, and to be attested
 " by, two or more credible witnesses,] " from
 " time to time, to sell or exchange all or any
 " part of the manors, hereditaments, and
 " premises, in the said county of Suffolk, in
 " and by these presents settled and limited
 " as aforesaid; so as that the money to arise
 " from the sale thereof, be laid out and in-
 " vested in the purchase of, and that the ex-
 " change be made for, manors, freehold mes-
 " suages, lands, and hereditaments, and
 " copyhold or leasehold messuages, lands,
 " or hereditaments, which may be near to,
 " or be intermixed with, or be proper and
 " convenient to be held and enjoyed with,

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“ the freehold hereditaments and premises so
“ to be purchased or taken in exchange ; but
“ so that the copyhold or leasehold heredi-
“ taments and premises, so to be purchased
“ or taken in exchange as aforesaid, do not
“ exceed one fifth part of the value of the
“ entire hereditaments and premises to be so
“ purchased and taken in exchange ; and so
“ as all the hereditaments and premises so
“ to be purchased and taken in exchange be,
“ immediately thereupon, conveyed, settled,
“ limited, and assured, to the same uses, upon
“ the same trusts, and for the same intents
“ and purposes, as the hereditaments and
“ premises, which shall be so respectively
“ sold or exchanged as aforesaid, are in and
“ by these presents limited and settled as
“ aforesaid.” With the usual declaration,
that the receipts of the trustees should be
good discharges to purchasers, &c.

By indentures of lease and release, dated
1st and 2d March 1804, Mr. and Mrs. Bouve-
rie, in pursuance of their power, duly ap-
pointed Robert Blake, Esq. to be a trustee
in the room of Mr. Fawkener, who was then
dead ; and by the same indentures, and by
indentures of lease and release, dated 3d and
4th March 1804 (indorsed on the release of
2d March 1804), all the trust estates were
duly conveyed to the said J. T. Batt and Ro-
bert Blake, and their heirs, to the uses and

upon the trusts of the settlements of November 1788.

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By indentures of lease and release, dated the 28th and 29th June 1811, the release being made between the said Edward Bouverie of the first part; Everard William Bouverie, his eldest son, of the second part; William Ainge, of the third part; and Richard White, of the fourth part; after reciting that the said Edward Bouverie and Everard William Bouverie were desirous of destroying the estates tail created by the settlement of 1788, and of settling the estates therein comprised (subject to the estates then existing therein previous to the estate tail of the said Everard William Bouverie), to the uses after mentioned; it is witnessed, that for barring the estate tail, &c. the said Edward Bouverie did grant, release, and confirm to the said William Ainge, and his heirs, during the joint lives of the said Edward Bouverie and William Ainge (amongst other estates,) the said estates in the county of Suffolk; to hold to the said William Ainge and his heirs during such joint lives; to the intent that the said William Ainge might become tenant to the præcipe in a common recovery, in which the said R. White was to be demandant, and the said Everard William Bouverie, vouchee. And it was thereby agreed, that such recovery, when suffered, should enure "to the

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 Of limitations “ the said indentures of lease and release of
 of uses, and cre- “ 21st and 22d days of November 1788,
 ation of legal “ were immediately previously to the sealing
 estates by the “ and delivery of these presents, or the lease
 statute, which “ for a year on which the same was grounded,
 differ from the “ subsisting or capable of taking effect, in
 rules of the “ the said hereditaments, antecedent to the
 common law. “ uses by the aforesaid indenture of the 22d
 “ day of November 1788, limited to the first
 “ and other sons of the said Edward Bouverie,
 “ by the said Catherine his wife, severally and
 “ successively, according to their respective
 “ seniorities, in tail male: and to the further
 “ use, that all and singular the trusts, powers,
 “ exemptions, and privileges, upon or to the
 “ said several uses charged, annexed, relat-
 “ ing, collateral, or limited to any person or
 “ persons seised of, or entitled to, the same,
 “ might still accompany the said several uses,
 “ and be vested in, and belong to, and be
 “ exercised by, the persons seised of, or en-
 “ titled to, the same uses, or in whom the
 “ same powers were vested; to and for the
 “ end, intent, and purpose, and so as that
 “ the said several uses, trusts, powers, ex-
 “ emptions, and privileges, might by these
 “ presents, and the recovery to be suffered
 “ in pursuance thereof, be to all intents, ef-
 “ fects, constructions, and purposes, esta-
 “ blished, or continued, and corroborated, or
 “ confirmed. And after the expiration, or

“sooner determination, of the said several
 “uses, and in the mean time subject thereto,
 “and subject to the several powers, and to
 “the uses, or estates, to be created thereby,”
 to such uses, as the said Edward Bouverie
 and Everard William Bouverie should ap-
 point; and in default of such appointment,
 to the use of the said Everard William Bou-
 verie in tail male; with remainder to the use
 of the said Edward Bouverie in fee.

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In Trinity term, 51st Geo. 3. a recovery
 was duly suffered, in pursuance of the last
 mentioned indentures.

By indentures of lease and release, dated
 the 20th and 21st December 1811, the release
 being made between the same Edward Bou-
 verie, of the first part; the said Everard Wil-
 liam Bouverie, of the second part; the said
 John Thomas Batt and Robert Blake, of the
 third part; the Rev. John Bouverie, of the
 fourth part; Henry Bouverie, Esq. and the said
 William Ainge, of the fifth part: the honour-
 able Philip Pleydell Bouverie and John Dor-
 rien, Esq. (trustees duly appointed in the room
 of the said Edward Vincent and John Blake,
 both deceased), of the sixth part; and the right
 hon. John then lord Crewe (in the settlement
 of 1788 called John Crewe, Esq. and who had
 survived the said Frederick Robinson, his co-
 trustee), of the seventh part: it is witnessed,

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that pursuant to, and in execution of, the power and authority to the said Edward Bouverie and Everard William Bouverie for that purpose given, by the said indenture of release of the 29th June 1811, and such recovery, and of every other power or authority, the said Edward Bouverie and Everard William Bouverie did thereby appoint, that the said estates in the county of Suffolk should (but subject, and without prejudice, to the uses, estates, and powers, in and by the same indenture of release limited and raised, or established and confirmed, antecedently to the joint power of appointment thereby given and reserved to the said Edward Bouverie and E. W. Bouverie) be and remain to the uses therein after declared. And it was further witnessed, that for a nominal consideration, the said J. T. Batt and R. Blake, according to their several estates and interests, did bargain, sell, and release, and the said Edward Bouverie and E. W. Bouverie did grant, release, and confirm, unto the said John Bouverie and his heirs, all and singular the said estates in Suffolk, to hold the same (but subject and without prejudice, as appears in the now stating indenture) unto the said John Bouverie, his heirs and assigns, to the uses therein after declared. And it was thereby declared, that as well the limitation and appointment, as the grant and release therein before contained, should seve-

rally enure to the following uses ; viz. to the intent, that the said Catherine Bouverie might, during the joint lives of herself and the said Edward Bouverie, receive thereout the rent-charge of 300*l.* provided for her by the settlement of 1788 ; and subject thereto, to the use of the said John lord Crewe, his executors, &c. for the term of ninety-nine years to commence from the date of the said indenture of the 22d November 1788, by way of continuation, corroboration, and confirmation of the term of ninety-nine years thereby limited ; and also by way of continuation, &c. of the trusts thereby declared of the same term ; with remainder to the use of the said Edward Bouverie for his life ; with remainder to the said J. T. Batt and R. Blake, and their heirs, during his life, to preserve contingent remainders ; with remainder to the use of the said Catherine Bouverie for her life, by way of corroboration of the estate limited to her by the said settlement of 1788 ; with remainder to the use of the same trustees, during her life, to preserve contingent remainders ; with remainder to the use of the said Philip P. Bouverie and John Dorrien, their executors, &c. for the term of five hundred years from the decease of the survivor of the said Edward Bouverie and Catherine his wife, by way of continuation, corroboration, and confirmation of the term of five hundred years limited by the said settlement of the

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22d November 1788, and also by way of continuation, &c. of the trusts thereby declared of the same term; with remainder to the use of the said Everard William Bouverie for his life; with remainder to the use of the said J. T. Batt and R. Blake, and their heirs, during his life, to preserve contingent remainders; with remainder to the first and other sons of the said Everard William Bouverie successively, in tail male; with divers remainders over in strict settlement. And in the said indenture a new power of sale and exchange of the above estates is reserved to the said J. T. Batt and R. Blake.

In order to decide whether the powers of sale and exchange, contained in the settlement of 1788, were destroyed by the deeds and recovery of 1811, an action of assumpsit was brought in the court of Common Pleas, Robert Roper, gent. plaintiff, and Thomas Halifax, Esq. defendant, for not performing a contract for the purchase of the estates in question. The cause was tried at the Westminster sittings in Easter term 1816, before Mr. Justice Dallas; when a verdict was found for the plaintiff; subject to the opinion of the court of Common Pleas on a special case.

The first point reserved and stated in this case for the opinion of the court, is not material to the present purpose.

The second point was, “whether the
 “power of sale contained in the settlement
 “of November 1788, was destroyed by the
 recovery of 1811? If not,

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“3dly, Whether the power was not re-
 leased, and at an end, by the settlement of
 “December 1811? If not, whether a good
 “title could be made to the defendant by the
 “plaintiff and Mr. and Mrs. Bouverie and
 “their trustees, under an exercise of the
 “power of sale in the settlement of 1788,
 “and also of the power of sale contained in
 “the settlement of December 1811; or under
 “one of those powers.” If the court should
 be of opinion, that a good title could be so
 made, then the verdict was to be entered for
 the remainder of the purchase-money: if not,
 a nonsuit was to be entered.

On the 16th of June 1817, Gibbs, Chief
 Justice of the Common Pleas, delivered the
 opinion of the court. In stating the case,
 his lordship said, “By the operation of all
 “the deeds, the estates, powers, and trusts,
 “created by the original deed of 1788, are
 “excepted out of the deed of 1811.” And
 after stating the opinion of the court on the
 first point reserved, his lordship proceeded
 thus:

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“Secondly. Whether the power of sale
“in the settlement of 1738, is destroyed by
“the recovery of 1811?

“To determine this, we must consider
“the nature of the power; by whom, and
“for whom, it is to be exercised.

“It is a naked authority, to be exer-
“cised by trustees for the benefit of those
“who take under the settlement. chiefly
“with the assent of Mr. and Mrs. Bouverie.

“It is antecedent to the estate tail.

“The proposition of the defendant is,
“that the recovery by Mr. Bouverie and his
“son, with the consent of Mrs. Bouverie,
“destroys this power. This is contrary to
“justice, and the intent of the settlors.

“It lies on the defendant to establish this
“on principle, or authority. He does nei-
“ther.

“The effect of a recovery is to destroy all
“remainders, &c. dependent on the estate tail.
“This is a power, which must act on the
“land, before it become subject to the estate
“tail, by substituting other land in its place.

“It is against all justice, that the tenant
“in tail should destroy the power, without

“ the concurrence of the parties interested.

“ Therefore the power is undisturbed by the recovery.

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“ Then it is said, that if the recovery did not destroy it, it was destroyed by the deeds of December 1811, in which the trustees joined and were granting parties.

“ We much doubt, whether a power of this sort could be destroyed by the trustees. It is a naked authority, for the benefit of others. But we are clear, that it has not. The deeds of 1811 operate as an execution of a power, and an appointment by Bouverie and his son under that power. But, by the terms of the deed, they act only on so much of the estate, as attended and followed the estate tail. By the terms of the deed, all previous to the estate tail is left untouched.

“ They remain on the operation of the deed of 1788; and the trustees retain their authority under that deed.

“ Third. Whether a good title, &c.

“ It is not necessary to say more on the power of 1811; because we are of opinion, that under the deed of 1788, there remains to the trustees full authority; and we are

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“ of opinion, that a good title may be executed
“ by the trustees. And if these are the ques-
“ tions upon which our opinion is required,
“ we are of opinion the plaintiff is entitled to
“ recover. And we do not mean to intimate,
“ that there are any other points in the case
“ to prevent his recovering.” Judgment was
accordingly given for the plaintiff^a.

When powers of selling, exchanging, or making partition are reserved to be exercised by trustees, having a seisin to uses, or having no interest at all, it is usual to insert powers authorizing the appointment of new trustees in the room of the original trustees in the event of death or incapacity. There can be no doubt, that by the mere appointment of the new trustees, they may be invested with the powers of selling, &c. without any ulterior act; but in practice, questions frequently arise upon the construction of powers of this kind^b.

Having explained the nature of powers in general, and the manner in which they may be destroyed or suspended, I shall defer the further consideration of them to a subsequent

^a See the opinion given on this case, before it came into court, Appendix, No. VII.

^b See Appendix, No. VIII.

part of this work, when I shall examine the deed or instrument, by which powers are executed.

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Of the seisin, whereout a shifting or future use must arise.

It is scarcely necessary in this place to repeat, that all future and shifting uses arise out of the estate of the feoffees, releasees, &c. and not out of the estate of cestuique use: for if a future use be limited out of the estate of the latter, it would in fact be the limitation of a use upon a use; which the law will not permit^a. It follows, that no springing use can be limited upon a bargain and sale: for the use cannot arise out of the estate of the bargainee, he being merely a cestuique use; nor can it arise out of the original seisin of the bargainor; for after the bargain and sale, there can be no possibility of seisin remaining in him. But this I shall explain more fully hereafter. As to powers of leasing, they can neither be reserved upon a bargain and sale^b, nor upon a covenant to stand seised^c: for the consideration in the latter conveyance can only extend to the covenantee, and those of his blood, and not to a lessee. But general powers of revocation may be reserved upon a covenant to stand seised^d.

^a 1 Co. 136. b. 137. a. Co. Litt. 271. b.

^b Poph. 81.

^c *Mildway v. Standish*, Moor, 144.

^d See *Shep. Touch.* 524. post 2 vol.

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Rules restraining springing uses within the limits prescribed against perpetuities.

(9.) Springing uses, whether arising under the provisions of a settlement, or by the exercise of powers reserved in it, and when they are to defeat an estate in fee-simple, are confined to the limits of time prescribed by courts of justice for preventing perpetuities. If an estate be limited to A. in fee, subject to be defeated in a certain event by a springing use in favour of B. and his heirs; or if an estate be settled to uses in strict settlement, subject to a power of selling reserved to a stranger and his heirs, and not capable of being barred or destroyed by the owner of the estate^a, the springing use, in either case, must be limited to arise within the compass of a life or lives in being, and twenty-one years after; or perhaps, in the case of a posthumous child, within a few months longer.

But the doctrine of perpetuity is not applicable to springing uses which determine an estate tail, in the nature of a condition subsequent; for the first tenant in tail in possession may by recovery bar the entail, and all remainders and collateral limitations expectant upon it, and acquire the fee-simple: as where an estate is limited to A. for life, with remainder to B. in tail, subject to a provision, that if B. shall not within a certain period assume, and continue to use, a parti-

^a See *Ware v. Polhill*, 11 Ves. 257.

cular name, the estate shall remain to C. in fee. A recovery by B. will defeat the limitation to C.

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So, where an estate is settled to uses in strict settlement upon A. for life, with remainder to his first and other sons successively in tail, with remainder to B. for life, with remainder to his first and other sons successively in tail, with other remainders of a similar kind, with a power of selling and exchanging reserved to the releasees, and the survivor of them, and the heirs of the survivor, to be exercised with the consent of the tenant for life or in tail for the time being in possession; here, if the first tenant in tail acquires the possession before the power is exercised, and suffers a recovery, the power is extinguished; and therefore the power in this case, is not within the reason of a perpetuity^a.

^a Goodwin v. Clarke, 1 Lev. 35. "And as to the creating of the term, it is said, that a term may as well be created to arise upon a failure of issue male, as a power to sell on the failure of issue male, which hath been adjudged good in the case of Vincent v. Lea, in Moor, Rep. 147. 3 Cro. 26. 1 Leon. 285. 3 Leon. 108. Co. Litt. 113. a. "And as to the objection of a perpetuity, it is nothing; for the son, who

"had the estate precedent, "might bar it by a common "recovery."

From these principles, a practice has arisen in cases of strict settlement, to direct, that during minority of each tenant for life or in tail, being an infant, the surplus rents and profits should be accumulated for some particular purpose; for the first tenant in tail of age, acquiring the possession, may by recovery destroy the trusts for future accumulations; but since the late

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It is said in the case of *Washbourne v. Downes*, 1. Cha. Ca. 23. that "A perpetuity is where, if all that have interest join, yet they cannot bar or pass the estate;" and in the case of *Scattergood v. Edge*, 1 Salk. 229. that "every executory devise is a perpetuity so far as it goes; i. e. an estate unalienable, though all mankind join in the conveyance." But these definitions of a perpetuity are not accurate. If an estate be limited to the use of A. and his heirs, but if B. should die without heirs of his body, then to the use of C. and his heirs, the limitation to C. and his heirs, would be void, as tending to a perpetuity. Yet C. might, no doubt, release or pass his future estate; and with the concurrence of the necessary parties, the fee-simple might be disposed of, before there was a failure of issue of B. A perpetuity may, with greater propriety, be defined to be a future limitation, restraining the owner of the estate from aliening the fee-simple of the property, discharged of such future use or estate, before the event is determined, or the period arrived, when such future use or estate is to arise. If that event or period be within the bounds prescribed by law, it is not a perpetuity.

cases of *Lord Southampton v. Marquess of Hertford*, 2 Ves. and *Beames*, 54. and *Marshall v. Holloway*, 2

Swanst. 432. it seems advisable to restrain the generality of these trusts.

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The principle seems applicable to all future interests, as rents' charge, and terms of years, which cannot be barred by the first tenant in tail in possession. A case of considerable interest arose in Ireland some few years ago. An estate having been settled by will to uses in strict settlement, a rent charge was limited to arise after the failure of issue of a person not taking any estate in the property settled: and upon argument it was determined by the Court of King's Bench in Ireland, that the limitation of the rent charge was void, as being too remote^a.

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The period, beyond which a springing use or executory devise is not allowed to take effect, seems to be adopted by analogy to limitations in strict settlement; as a limitation to A. for life, with remainder to his first and other sons successively in tail, with remainders over of the same kind; the first tenant in tail cannot be deprived of the possession beyond a life or lives in being; and in consequence of his minority, he may be deprived of the actual power of alienation until 21 years after; and hence it has been contended in the late case of *Beard v. Westcott*, 5 Taunt. 393. and 5 Barnw. and Ald. 801. that a limitation after an estate for a life or lives in being, and a gross term of 21

^a *Hartopp v. Lord Carbery*, 1819.

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years, is not warranted by the rule prescribing the limits of springing uses and executory devises; for by analogy to settlements, from which the rule is taken, the 21 years must depend upon the minority of an infant, who may die during infancy, and thereby afford a chance of accelerating the limitations over. It cannot be discovered from the certificate of the Judges of the King's Bench, whether this argument prevailed; but if it should be ever judicially adopted, it would, no doubt, seriously affect many titles: the rule having been, at least in practice, settled since the duke of Norfolk's case, in the reign of Charles the 2d, that the limitation of time in the case of perpetuities extended to a life or lives in being, and 21 years afterwards.

It is supposed, however, that the laws prohibiting perpetuities in springing uses and executory devises have been adopted by analogy to the common law. But I do not know where the analogy is to be discovered. In Co. Litt. 214. b. it is said, "that if I "enfeoff another of an acre of ground, upon "condition, that if mine heir pay to the "feoffee, &c. 20s., that he and his heirs shall "enter, this condition is good." But I do not find any rule of the common law, confining the period, within which the entry is to be made; and although an *interesse termini* may be created at the common law, I am not

aware of any case at the common law, fixing the period, within which it must take effect in possession. The converse, therefore, of the supposition, will probably be more correct; for it can scarcely be doubted, that by analogy to the modern doctrine of perpetuities, the rights of entry upon common law conditions, and the *interesse termini*, would be confined to the time allowed in cases of executory devises and springing uses.

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It may be proper to conclude these observations on perpetuities, with noticing a case of great importance, and on the validity of which many titles depend.

An estate is devised to A. and his heirs, he and they taking and using a particular surname. In this case it has been contended, by gentlemen of respectability, that if A. assumes the name, he acquires the estate, subject to a condition in law, that if he or his heirs discontinue to use the surname, the heir at law of the testator will have a right of entry upon the estate, at whatever period the non-user of the name may happen. If this construction should be correct, a perpetuity would be created; but I cannot entertain a doubt, that the principle of law prescribing the boundaries within which springing uses and executory devises are to take effect, would apply to the entry of the heir in

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this case, upon the breach of the condition, if it were admitted, that such condition was not performed by taking the name.

But independently of viewing the case upon the principle of perpetuity, there seems to be no doubt, that the heir, in this case, would have no right of entry, upon the non-user of the name: the devisee having, in the first instance, assumed the name.

It may, on the other hand, be contended, that the devisee would take a determinable fee, not being an estate tail, and so not within the operation of a recovery: or that the devisee would take a fee-simple subject to a condition having a double operation: first, to acquire the estate on the performance of one act; and secondly, to lose it on the non-performance of another; and that this condition is not within the laws relating to perpetuities. Neither of these arguments appears to be tenable.

Before^a the statute of *quia emptores* (18 Edw. 1.) an estate might have been granted to A. B. and his heirs, so long as C. D. and his issue should live, or so long as C. D. and

^a The following observations are extracted from an opinion prepared by the author, and which was sub-

sequently well considered by two gentlemen of eminence at the bar, and signed by them.

his heirs should be tenants of the manor of Dale; and upon C. D.'s ceasing to have issue, or of being tenant of the manor of Dale, the estate reverted to the donor, not as a condition broken, of which the donor, or his heir, might take advantage by entry; but as a principle of tenure, in the nature of *an escheat* upon the death of a tenant in fee-simple without heirs general. But the statute of *quia emptores* destroys the immediate tenure between the donor and donee, in cases where the fee is granted; and consequently there can now be no reverter, or any estate or possibility of a reversion, remaining in the donor after an estate in fee granted by him. This conclusion directly follows from the doctrine of tenures, and the effect of the statute of *quia emptores* upon that doctrine. The proposition does not require the aid of decided cases; but the passage in 2 And. 138. contains an accurate exposition of the law upon this subject: "If land be given to A. and his heirs, *so long as J. S. has heirs of his body*, the donee has fee, and may alien it. 13 Hen. 7., 11 Hen. 7., 21 Hen. 6. fol. 37.; and says the law seems to be plain in it; and cites 11 Ass. 8., where the S. C. is put and held as before; and that there if the land be given to one and his heirs, *so long as J. S. and his heirs* shall enjoy the manor of D., those words (*so long*) are

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The references in this passage (with the exception of the 11 Ass. 8.) are not in the report correctly stated; but they are discovered in 13 Hen. 7. Easter Term, fol. 24. 11 Hen. 7. pl. 25. 21 Hen. 6. Hill. pl. 21. It will be proper to refer to the case first mentioned; premising, that, by the common law, where an absolute estate in fee-simple was granted, no restraint could be placed on the alienation of it; inasmuch as such restraint would be repugnant to the grant itself. Upon a question, in the case referred to, whether a condition restraining alienation upon the grant of an estate tail since the statute *de donis*, was valid, Vavisour thought it valid; but added, that he agreed, that such condition imposed on a feoffee in fee-simple, *so long as J. S. has issue*, was void.

There is no ground, therefore, to consider the case in question, as a determinable fee at the common law.

The fee-simple conditional at the common law before the statute *de donis* (13 Ed. 1285), differed from the fee-simple made subject to be defeated by the performance or non-performance of a condition, of which the grantor or his heir might take advantage by entry.

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If an estate were granted to A. and his heirs, and if the grantor paid the grantee or his heirs a sum of money, the grantor or his heirs might re-enter; or if the estate were granted to John Thompson and his heirs, with a right of entry reserved to the grantor and his heirs, in case the grantee or his heirs should discontinue to use the name of Thompson; the condition in each of these cases is of the latter sort. Its operation is single by defeating the estate on doing, or omitting to do, a particular act.

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But when an estate is given to A. and his heirs, he taking the name of B. within a given period, and he and his heirs afterwards continuing to use such name; here there are in fact two conditions; and the case resembles the fee-simple conditional at the common law, as mentioned in the statute *de donis*.

The fee-simple conditional at common law before the statute *de donis*, was created by a conveyance to a man and the heirs of his body, with a condition annexed to the gift, that if the grantee died without issue, the lands should revert to the donor. They construed the conveyance to the grantee *and the heirs of his body*, equivalent to a fee-simple, upon which no remainder could be appointed, in the same way, as if the gift had been made to a man and his heirs, if he *had heirs of his*

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body. The birth of the issue was the performance of the condition, which, for the purpose of alienation, made the fee-simple, in the hands of the alienee, absolute, by destroying the possibility of reverter. But if, before alienation, the donee had died without issue, the lands reverted to the donor; and the remedy for recovery of the lands upon the reverter, was not by entry of the donor or his heirs, as for a condition broken, but by a *formedon in the reverter*. See Plowden, 235 where these points are accurately stated.

Hence it appears, that if lands were given to A. and the heirs of his body, with a condition expressed, that if A. died without heirs of his body, the lands should revert; upon the birth of issue of A., the condition was performed, and A. had an immediate power of aliening the absolute fee-simple; so that for the purpose of facilitating the power of alienation, the birth of the issue was considered as the performance and dispensation of the condition in a case, where the right of entry was in terms expressed to arise on the *failure* of issue. This seems to be a case precisely analogous to that of a condition requiring a person to take and use a name; the taking the name gives the grantee or devisee a right to the estate, by amounting to a performance of the condition, and the subsequent non-user does not deprive him of it; for according

to the principle of conditional fees, a condition cannot have a double operation, so as to confer upon a man an estate by the performance of an act required by the condition, and subsequently to deprive him of it by the non-performance of another.

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It will be seen from the above observations, that in the case of the fee-simple conditional at the common law, the grantee, upon the birth of issue, acquired as between himself and the donor, but without prejudice to the rights of the alienee of the grantee, a determinable fee: which determinable fee was, as I have before explained, made absolute by the operation of the subsequent statute of *quia emptores*.

But in the case of the common condition, as in the gift or devise of an estate to John Thompson and his heirs, subject to a right of entry reserved to the donor or deviser or his heirs, in case John Thompson and his heirs should cease to use that surname, there can be little doubt, it is conceived, that courts of justice would limit the breach of the condition, to the periods fixed by the policy of law, in cases of springing uses and executory devises.

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VI. I have now explained the cases, in which the creation and limitation of estates

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SECT. VI. by way of use since the statute, correspond with, and differ from, the ancient manner of limiting and creating estates at common law. I shall now proceed to point out the alterations produced by the statute of uses in the ancient laws relative to *remitter*.

Of the effect of the statute of uses upon the laws of *remitter*.

By the common law, if tenant in tail had enfeoffed his son in fee, which son at the time of the feoffment was within age, and the tenant in tail had died; the son, after the father's death, as heir in tail, would have been remitted to his former estate^d. But since the statute, if tenant in tail make a feoffment in fee to the use of his issue being within age, and to his heirs, and then die; and the right of the estate tail descend to the issue, being within age; the issue shall not be remitted; for the issue has the use in fee by the feoffment, and then the statute executes it in such manner and plight, as it was first limited. But in the case, if the issue waive the possession, and bring a formedon in the descender, and recover against the feoffees, he shall be remitted^e.

It was therefore said, that if an infant, or a woman, having right to lands discontinued, whereon entry was not lawful, came to such lands by way of use raised out of the estate,

^d Litt. sec. 660.

^e Co. Litt. 348. b.

the first taker should not be remitted^f. So Sect. VI.
 in Amy Townsend's case^g, where tenant in Of the effect of
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 laws of remitter.
 tail made a feoffment in fee to the use of his
 wife for life; remainder to his son and heir
 apparent in fee. The feoffor and his wife
 died; and it was determined, that the heir in
 tail was not remitted. However, though the
 first taker be not, as in the case of the issue
 put by Coke, yet it seems, that the issue of
 that issue, or the one in remainder after the
 first taker, shall be remitted^h.

Amy Townsend's case was not affected by
 the statute 32 Hen. 8. That statute directs,
 that the fine or feoffment of the husband of
 the wife's land shall not operate as a discon-
 tinuance: and, therefore, as to the wife and
 those claiming under her, it has considerably
 lessened the effect of the statute of uses upon
 remitters. The case of *Duncombe v. Wing-
 field*ⁱ was in substance thus: A. and B. his
 wife, being seised in fee in right of B., levied
 a fine with proclamations to the use of them-
 selves, and the heirs of their two bodies be-
 gotten, remainder to J. S. for life, remainder
 to W. in tail, remainder to B. (the wife) in
 fee; afterwards A. alone levied another fine
 with proclamations to the use of himself and
 wife in special tail as before, remainder to

^f Hob. 255.^h Co. Litt. 348. b.^g Dyer, 54. a. b. Hob.
255. Plowd. 111.ⁱ Hob. 254. Vide 8 Co.
71. b. Dyer, 191. b.

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himself in tail, remainder to himself and E. M. in fee. B. died without issue, and then A. died. Upon this state of the case, three material points were settled. The first point was, that where husband and wife are tenants in special tail, and the husband discontinues by fine or feoffment, and takes back an estate in special tail to himself and wife, the wife is *ipso facto* remitted, and of course the husband; though it is true the husband is so far bound by his own act, that he cannot claim it in his own person. That in Amy Townsend's case the right of the wife was not within the saving of the statute of uses, and of course she was not remitted against the express words of that statute: but that the 32d Hen. 8. had changed the reason of that case; so that now, the use being raised to the wife out of the estate created by the fine, she is not in of an estate *discontinued*, but of an estate whereupon she might enter after her husband's death; and that a right of entry was sufficient to support her remitter, without an actual entry. That it was true the fine of the husband alone finally and totally barred the issues in tail, and therefore differed from a feoffment at the common law; yet the entail, which is barred as to the issue, remained, notwithstanding the fine, to the wife in right, as to herself, and to all estates and remainders depending upon it, and to all the consequences of benefit to herself, and

to others by her, as long as she lived, as
 amply and beneficially, as if the fine had not
 been levied.—2d Point. As the husband and
 wife were both remitted to the first estate tail,
 of consequence J. S. and those in remainder
 expectant on that tail, were also remitted.
 But that upon the *death* of the *wife* the re-
 mainders were dislodged, and turned into
rights, as they were by the fine, and would
 have been, if the wife had not been remitted.
 —As to the third point, it was held, that
 after the death of the wife the remitter ceas-
 ed, and the land returned again into the es-
 tate passed by the second fine; which estate
 continued during the life of the husband,
 and would continue as long as there was
 issue, if there had been any; for till then,
 those in remainder had no title to demand
 the land: but after the death of the husband
 and wife *without issue*, the entry of J. S. was
 lawful. In this case lord Hobart said, that
 if after the death of the wife the husband had
 properly suffered a recovery, he would have
 barred all the remainders depending upon any
 of the estates. He also held in another place,
 in the same argument, that if the wife had
 survived the husband, and had suffered a re-
 covery, it would have barred the remainder
 depending upon the first estate tail; but so
 long as there was issue living between them,
 the premises would go according to the estate
 passed by the second fine.

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It is agreed, that if, in the above case, the husband had made a *feoffment*, instead of levying a *fine*, it would not have *barred*, but only have *discontinued*, the right of the issue^k. Therefore, as the wife by her entry would have been remitted, so she would have purged the discontinuance, and restored the right of the issue, by restoring the discontinued estate tail. If too a tenant in tail make a feoffment to the *use* of himself *in fee*, or to the use of himself *for life*, remainder to B. for *years*, and does not dispose of the reversion; in either case, the issue, it seems, is remitted, though the tenant in tail himself is not^l.

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VII. I have before observed, that uses in their commencement were of a secret nature, depending merely upon a parol agreement or declaration between the feoffee and cestuique use. But in process of time it was found necessary to make some certain declaration of the use, indicative of the intention of the parties; and this declaration of the use must now by the statute 29 Car. 2. c. 3. be in writing^m.

^k 1 Lev. 49. 1 Sid. 63.

^l 1 Roll. Rep. 260. Moor, 846. pl. 1143. B. N. C. 215. 8 Co. 72. a. Lane, 93 to 96.

^m See Holt's Rep. 736. By the 7th section of the above act it is enacted, "that from and after the 24th day of June (1677), all declarations or creations of trusts or confidences of

"any lands, tenements, or hereditaments, shall be manifested and proved by some writing signed by the party, who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect."

The conveyances by bargain and sale, SECT. VII.
and covenant to stand seised, are in fact no-
thing more than declarations of uses; Of declarations
of uses. for the
use being served out of the seisin of the bar-
gain~~er~~ and covenantor in those conveyances,
they merely serve to declare the use to the
bargainee and covenantee. But upon such
conveyances as operate by way of transmuta-
tion of possession, the use may be declared
by a deed or writing distinct from the con-
veyance, by which the possession is trans-
ferred. Indeed, upon the conveyances by
feoffment and lease and release, it is now
universally the practice to declare the use in
the same deed immediately after the habend-
um. But in respect to fines and recoveries,
the uses are declared either by deed *precedent*
or *subsequent* to the levying of the former,
or suffering the latter. After the statute 27
H. 8. c. 10. it became questionable, whether
if a recovery were suffered or fine levied,
without any previous declaration of the uses,
any subsequent deed could direct them? For
it was thought, that upon suffering the re-
covery or levying the fine, the use resulted to
the recoveree or conuzor, which resulting use
the statute immediately executed: so that the
use being once vested and executed by the
statute, it could not be divested by any sub-
sequent declaration. However, in Dowman's

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caseⁿ it was determined, that although the use resulted to the recoveree or conuzor until the subsequent declaration, yet, when that was made, the use was immediately executed according to the declaration. Soon after the statute 29 Car. 2. c. 3., which directs that all creations and declarations of uses shall be in writing, it again became a doubt, whether resulting uses upon fines and recoveries were not so executed as to exclude any *subsequent deed*^o: for it was supposed, that the statute required the use to be declared either previously to, or at the time of, levying such fines and recoveries. Therefore by the statute 4 Anne, c. 16. s. 15. declarations of the uses of fines and recoveries manifested by any deed, made by the party, *after* the levying of such fines or suffering such recoveries, shall be as effectual as if the 29 Car. 2. c. 3. had not been made^p. This statute only mentions fines

ⁿ 9 Co. 7. b. 28 Eliz. See Bessett's case, Dyer, 136. a. In Dowman's case a recovery was suffered in Hilary term, 15 Eliz. The original writ was dated the 20th Jan. 15 Eliz., returnable the 22d Jan. Seisin was delivered 4th Feb. (Moor, 191.) The deed declaring the uses of the recovery was dated the 1st Feb. 15 Eliz.

^o See Gilb. Uses, 62.

^p " And whereas it hath
" been doubted, whether
" since the making of the

" said last mentioned act of
" parliament (29 Car. 2. c.
" 3.), the declarations of
" uses, trusts, or confi-
" dences, of any fines or
" common recoveries mani-
" fested by *deed* made after
" the levying or suffering of
" such fines or recoveries
" are good and effectual in
" law; it is hereby declared,
" that all declarations or
" creation of uses, trusts, or
" confidences of any fines,
" or common recoveries of
" any lands, tenements, or

and recoveries; and therefore the same doubt, SECT. VII.
 if it was well founded, still remains as to the Of declarations of uses.
 conveyance of a feoffment.

I shall now consider, First, who may declare uses—Secondly, In what cases one declaration of the use shall be controlled or annulled by a subsequent declaration—Thirdly, Where the same instrument contains two contradictory declarations—Fourthly, The general construction upon, and effect of, the declaration of uses.

First. Who may declare or limit the use. Who may declare uses.

The king may declare uses upon his letters The king.
 patent, though indeed the patent of itself implies a use^a. But if the king grant lands to J. S. and his heirs by his letters patent, to the use of J. S. *for life*; here J. S. has only an estate for life, and the king has the inheritance without any office found: for implication out of matter of record ever

“ hereditaments manifested
 “ and proved, or which
 “ hereafter shall be manifested and proved by any
 “ deed already made, or
 “ hereafter to be made, by
 “ the party who is by law
 “ enabled to declare such
 “ uses or trusts, after the
 “ levying or suffering of any
 “ such fines or recoveries,

“ are and shall be good and
 “ effectual in the law, as if
 “ the said last mentioned
 “ act had not been made.”
 See *Bushell v. Burland*,
Holt's Rep. 733. where the
 declaration of uses was *four*
 years after the fine had been
 levied.

^a *Bac. Uses*, 66.

SECT. VII. amounts to matter of record. The queen
 Of declarations of uses. may also declare uses^r.

The queen.

Idiots.

Infants.

An idiot, or person of non-sane memory, may declare uses upon a fine or recovery; which declaration of uses will continue valid as long as the conveyance, upon which the uses are declared, remains of force^s. It is the same with respect to an infant. Therefore if an infant levy a fine, or suffer a recovery, and limit the use thereupon, he cannot avoid the declaration of the use, without avoiding also the fine or recovery^t: for as the matter of record stands, the law supposes, that the conuzor or recoverer was of full age; and the deed to declare the uses, being part of the fine or recovery, shall stand likewise. But a covenant by an infant in consideration of marriage or blood to stand seised to an use, is void^u.

In a case, where A. tenant for life, and B. his eldest son, an infant, tenant in tail in remainder, entered into marriage-articles, by which A. alone covenanted within a year after his son should come of age, that he and

^r Bac. Uses, 66.

^s Mansfield's case, 12 Co. 124. Lewing's case, cited 10 Co. 42. b. But see 4 Leon. 89. and sir Butler Wentworth's case, cited 2 Ves. 403. 3 Atk. 313. 13

Vin. 305. pl. 3. and note (M. a.)

^t Bac. Uses, 67. 2 Co. 58. a. 10 Co. 42. b. 3 Atk. 710. Moor, 22. pl. 73. 13 Vin. 304. pl. 1.

^u Bac. Uses, 67.

his son would by fine or recovery convey the settled estate to certain uses ; and both A. and B. sealed the deed, and within the time specified joined in a fine and recovery, it was determined, that the mere consent of B., by his sealing the deed, was not a sufficient declaration by him of the use of the fine and recovery^v. But in *Slocombe v. Glubb*^w, where, upon the marriage of a male infant and an adult female, the intended wife conveyed her real estate to certain uses, and both the intended husband and wife enter into a covenant within one month after the infant arrived at the age of twenty-one years to suffer a recovery of the infant's estate to the uses declared of the wife's estate: the question arose upon a bill by the trustees to have a specific performance of the infant's covenant, whether he was bound? Lord *Thurlow* said, that it was not necessary to determine how far the infant husband could be bound by his own contract: for the wife being adult, had also entered into the covenant; and the husband must answer her contract^a.

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^v *Nightingale v. Ferrers*, 3 P. W. 207.

^w 2 Bro. Cha. Ca. 545. 1 Ves. J. 28.

^a How far the *real* estates of *female* infants can be bound by marriage-contracts, see *Cannel v. Buckle*, 2 P. W. 243. *Harvey v.*

Ashley, 3 Atk. 607. *Durnford v. Lane*, 1 Bro. Cha. Ca. 106. *Caruthers v. Caruthers*, 4 Bro. Cha. Ca. 500. *Clough v. Clough*, 3 Woodson, 453. note. 5 Ves. 710. and in *Milner v. Harewood*, 18 Ves. 275, 276.

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of uses.Baron and
feme.

It seems, that a feme covert cannot, without the consent of her baron, create or limit the use of her lands^b. But if *baron* and *feme* levy a fine, or suffer a recovery, of lands, of which they are seised in right of the feme, though they ought regularly to join in the declaration of the uses of such fine or recovery, yet if the husband in such case alone declare the uses, his declaration will bind the feme (although an infant^c), if she do not dissent to it^d, for as she joined with her husband in the fine or recovery, the presumption is, if the contrary cannot appear, that she agreed with him in the declaration of the uses. Indeed, if she acquiesce for any length of time after her husband's death in the declaration of uses made by him, she cannot afterwards invalidate the fine or recovery^e. As the conveyances by feoffment and lease and release do not bind the feme, although she be a party, any declaration by her and her husband of the uses, raised upon those conveyances, shall be void as to her^f. But if husband and wife bargain and sell lands for money, and afterwards levy a fine to the bargainee, the bargain and sale is considered

^b See Johnson v. Cotton, Skin. 275. And 164. pl. 209. in case of Colgate v. Blythe.

^c 2 Roll. Ab. 798. 22 Vin. 232. pl. 2.

^d Beckwith's case, 2 Co. 57. a. Moor, 197. Anon.

Moor, 22. pl. 73. Lusher v. Banbong, Dy. 290. a. See the cases collected in note to pl. 1. 22 Vin. 232. T.

^e Swanton v. Raven, 3 Atk. 105.

^f Gilb. Uses, 244.

merely as the declaration of the use of the fine, and as such will bind the wife^g. SECT. VII.
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of uses. If in declaring the uses of a fine levied, or recovery suffered, of lands, held in right of the wife, the husband and wife make separate declarations of the uses, neither of them can stand, and then it will be the same, as if no declaration were made; in which case the use will result, and return to its former course, viz. to the feme and her heirs^h. But with respect to baron and feme, we must distinguish between a limitation of the use of part of the estate in the land, and the limitation of the use of part of the land itself. This distinction was taken in Beckwith's caseⁱ. Thus, if husband and wife differ in the limitation of the particular use, but concur in the limitation of the uses in remainder, yet the whole of the uses are void. But if they agree in limiting the use of part of the land itself, and vary in the declaration of the use of the residue, the declaration shall be good for the part they agree in, and void for the remainder.

Where a husband seised of the fee-simple of an estate, to which the dower of his wife

^g 2 Co. 57. a. Moor, 22. pl. 73. See the cases in note to pl. 4. 22 Vin. 232.

^h Moor, 197. pl. 347. See note to pl. 6. 22 Vin. 233.

ⁱ 2 Co. 56. b. 58. a. 22 Vin. 233. pl. 6, 7. and notes in the margin.

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attaches, conveys to a purchaser, and enters into a covenant, that he and his wife will in a subsequent term levy a fine to the purchaser, it is not absolutely necessary, that the wife should join in the declaration of the uses of the fine^k; for in this case the fine operates, so far as concerns the wife, as an extinguishment of her right to dower; and there can be no resulting use upon a conveyance operating as the release of a right^l, and not as the transfer of an estate.

Tenant for life,
and remainder-
man.

So if tenant for life and remainder-man levy a fine, or suffer a recovery, and the tenant for life alone declare the uses, this declaration shall not affect the remainder-man^m. And it should seem, that if the remainder-man seal, and be a party to, the deed, in which the tenant for life alone covenants to suffer a recovery, &c. to certain uses, this does not bind the remainder-man, though he afterwards should join in suffering the recovery, &c.ⁿ Joint-tenants may each declare different uses of their respective shares^o.

Joint-tenants.

^k See *Haverington's case*, Owen, 6. 2. Bac. Ab. 140. and *Eare v. Snow*, Plowd. 514.

^l 13 Co. 55. Note to pl. 1. 22 Vin. 209. (O. 3.)

^m See *Roe v. Popham*, Dougl. 25. *Argol v. Cheney*, 22 Vin. (T. 6.) 236. pl. 1. and note in the margin.

ⁿ Per Master of the Rolls in *Nightingale v. Ferrers*, 3 P. W. 206. But note, in that case the person in remainder was an *infant*; therefore *quare*.

^o 2 Co. 58. a. 22 Vin. 236. pl. 1.

Secondly. In what cases a previous limitation of the use shall be controlled by a subsequent declaration by a distinct instrument.

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In what cases the first declaration shall be controlled by the subsequent.

I have before had occasion to remark, that in a conveyance by *deed*, transferring the seisin to a grantee, such as a feoffment or lease and release, the use is declared by the conveyance; and it scarcely ever occurs in practice, that the use is, in that case, declared by an instrument, distinct from the deed conveying the seisin. Where the conveyance is by bargain and sale, or covenant to stand seised to uses, the conveyance itself is the declaration of the use.

But when the assurance, transferring the seisin to serve the uses, is by fine or recovery, the uses are limited by deed executed either before, or after, the levying the fine, or suffering the recovery. If before, the deed is said to *lead*, and, if after, to *declare* the uses of the fine or recovery. It has happened, in the case of fines and recoveries, that there have been contradictory limitations of the uses: and from this circumstance several intricate and perplexing points have arisen.

If there be a deed leading the uses of a fine or recovery, those uses may be altered,

SECT. VII. varied, or absolutely revoked previously to
 Of declarations the levying the fine or suffering the recovery.
 of uses. When the fine or recovery is conformable in
 time, persons, and other circumstances, with
 the deed leading to the uses of it, then the va-
 riation, alteration, or revocation of the uses
 may be effected;

First, By a deed or other instrument of as
 high nature, as the preceding deed or instru-
 ment; for, *nihil tam conveniens est naturali*
æquitati, unumquodque dissolvi eo ligamine,
quo ligatum est: but in this case a deed lead-
 ing the uses of a fine or recovery cannot be
 varied by a mere writing without seal^p.

Secondly, By the mutual consent of all
 parties concerned in interest.

The author of the Touchstone (519.) has
 adopted the rule, “ When the agreement for
 “ the limitation of uses is precedent, whether
 “ it be by writing or word (it must be now in
 “ writing by the statute of frauds), it is but
 “ *directory*, and doth not bind the estate, un-
 “ til the same assurance be afterwards had ;
 “ and therefore by a new agreement, or decla-
 “ ration made, in the same manner as the
 “ former, that is to say, in writing, if the
 “ former be so, and *between the same parties*,

^p Countess of Rutland’s case, 5 Co. 26. a.

“either before or at the time of the same as-
 “surance passed, new uses may be made,
 “and the former uses changed.”

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By^a a deed dated on the 21st of August 1661, Philip Stapilton was tenant for 99 years, if he should so long live, remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail male, remainder to his right heirs.

Philip having two sons, Henry and Philip, they by deeds of lease and release, dated the 9th and 10th of Sept. 1724, release and confirm to Thompson and Fairfax all those manors, &c. to hold to them, their heirs and assigns, to the use (as to part) of Philip the father, his heirs and assigns for ever, and as to another part, to the use of Philip the father for life, remainder to Henry the son for life, remainder to two trustees to preserve contingent remainders, remainder to his first and every other son in tail male, remainder to Philip the son for life, remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail male, remainder to the daughters of Henry in tail, remainder to the daughters of Philip the son in tail, remainder to the right heirs of Philip the father; and as to the remaining

^a 1 Atk. 2. *Stapilton v. Stapilton.*

SECT. VII. part, to the use of Philip the father for life,
 Of declarations with the like limitations in the first place to
 of uses. Philip the son and his issue, and then to
 Henry and his issue, remainder in fee to the
 father.

There were covenants to suffer a recovery within twelve months, and likewise for further assurances. To this deed the heir at law of the surviving trustee in the deed of 1661, was not a party.

But by deeds of lease and release, dated the 28th and 29th of Sept. 1724, to which the heir of the surviving trustee of the deed of 1661, was a party, the father and two sons made Thompson and Fairfax tenants to the præcipe, in order to suffer a recovery for the purposes mentioned in the former deeds of the 9th and 10th of Sept.

Before any recovery suffered, Henry died, leaving issue the plaintiff.

Afterwards by lease and release, dated the 12th and 13th of April 1725 (to which the heir of the surviving trustee of the deed of 1661, was a party), Philip the father, and Philip the son, covenant to suffer a recovery, in which Thompson and Fairfax were to be tenants to the præcipe, to the use, as to part, of Philip the father, his heirs and assigns ;

and as to the other part to the use of Philip the father for life, remainder to Philip the son in fee.

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In Trinity Term, 1725, a recovery was suffered, in which were the same tenants to the præcipe, the same demandant, and the same vouchees (except Henry who was dead), as were covenanted to be by the first deed; it was likewise suffered within twelve months after the first deed.

Lord Hardwicke stated the first question to be, whether the lease and release of the 9th and 10th of Sept. 1724, would amount to a good declaration of the uses of the recovery, notwithstanding the subsequent deed of April 1725.

His Lordship observed, that as uses must arise out of the agreement of the parties, the parties may change the uses; but that must be done by the mutual consent of all the parties concerned in interest. “But in the “present case, the second agreement not “being between all the parties concerned in “interest, ought not to control the first declaration; and especially as this recovery “was suffered within the time prescribed by “the first deed, and between the same demandant and tenant. The consideration “for suffering the recovery was good, both

SECT. VII. "in law and equity; and there is no case to
 Of declarations "warrant me to say, the first agreement is
 of uses, "not good and binding, or that the tenant
 "in tail could by his own agreement after-
 "wards change the uses^a."

His Lordship added, that if it was doubtful, whether the recovery suffered in 1725, should enure to the uses declared by the deed of 1724, he was of opinion, the recovery would operate to make good those estates which passed by the deed of 1724^r.

^a *Bingham v. Hussey*, 12 Car. 2. 1 Cha. Rep. 192. ed. 1715. "Thomas Hussey settles by deed, 22 Car. 1. on Delaline Hussey his son, in consideration of 6000*l*. portion with the wife of Delaline, and covenanted to levy a fine; and afterwards in 1655, the defendant procured him to make another settlement contrary to the former, and left out the limitation to the heirs male, and levied a fine thereof. This court upon the proofs of the first agreement, decreed the latter deed and fine to be void and set aside, and the premises to be enjoyed according to the first deed, as if a fine had been levied."

^r This is upon the principle of *Cheney v. Hall*, Amb. 526. (1765), *Moody v. Moody*, *ibid*. 649. (1767), and *Goodright v. Mead*, 3 Burr. 1703.

Cheney v. Hall.

1706. Conveyance by G.W. the father,

To the use of himself for life, with remainder as to part,
 To the use of his wife for life, remainder as to the whole,

To the use of the first and other sons of the marriage.

1733. Conveyance by lease and release upon the marriage of G.W. the eldest son of the marriage.

To the use of himself for life,

To the use of his intended wife for life,

To the use of the heirs of the body of the wife,

His own right heirs.

1746. G.W. the father, and son, suffer a recovery and declare the use, To a mortgagee in fee, And subject thereto,

The

But when there is a deed leading the uses of a fine or recovery to be subsequently levied or suffered, and the fine or recovery varies from the preceding deed in time, persons, or other circumstance; then the uses of the first deed may, previously to the fine or recovery, be varied by another instrument, although such subsequent instrument be not a deed, but merely a writing without seal^s; and

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The father for life,
Son in fee.

Lord Northington
thought, that the
common recovery
enured to the uses
of the settlement
1733.

Moody v. Moody.

E. M. tenant in tail in the
year 1709 conveys

To the use of himself
and intended wife
for their lives,

Heirs of their bodies,
Himself in fee.

Covenant to do further
acts by fine or recovery.—
Recovery afterwards suf-
fered by E. M.

Lord Camden held, that
the recovery barred the en-
tail, of which he (E. M.)
was seised before the set-
tlement, and operated as a
confirmation of the settle-
ment.

*Goodright dem. Tyrrel v.
Mead.*

J. S. tenant in tail with the
immediate reversion,
24th, 25th Oct. 1742,
in consideration of an
intended marriage,
conveys to trustees,

To the use of himself
for life, with re-
mainders over.

1761. Recovery by J. S. to
the use of L. in fee,
in trust to sell, and
pay debts, &c.

1763. Conveyance by L.
the trustee to the use
of a purchaser in fee.

The court unanimously
of opinion, that the reco-
very enured to the uses of
the settlement.

* *Jones v. Morley*, 2 Salk.
677. 9 Will. 3. The ab-
stract of this case is thus;—
29 Jan. 1665. (Hilary Term).
Deed of covenant to
levy a fine in the then
next Hilary Term
(1666).

31 Jan. 1665.

Agreement, not being
a deed, between the
same parties, that the
uses of the deed of
the 29th Jan. 1665,
should be revoked.

The fine was levied in
Hilary Term, 1665, and
not in Hilary Term, 1666;
and consequently there was
a variance.—The first deed
was revoked.

SECT. VII. although all the persons interested under the first declaration are not parties to the second^t: and indeed the uses of the first deed may, *after* levying the fine or suffering the recovery, be varied^u; but in this case, if the doubt suggested by the statute 4 Anne, c. 16. s. 15. be sufficiently grounded^w, the subsequent variation of the uses must be by *deed*, and not merely by writing without seal.

When the fine or recovery does not vary in circumstances from the deed leading the

^t Countess of Rutland's case, 5 Co. 25. b. 2 Jac. 1.

The abstract of this case is as follows :

10 March, 21 Car.

Voluntary settlement after marriage between,

1. Edward earl of Rutland,

2. Sir Gilbert Gerard, and Thomas Holecroft,

by which the earl covenants, before the end of Trinity Term then next, by fine, or other conveyance, to assure the manor, &c.

To the use of,

The earl and the countess his wife for their lives,

The heirs of the earl.

29th March, 21 Car.

Voluntary deed between,

1. Edward earl of Rutland,

2. Lord Burghley, sir Gilbert Gerrard, and others,

by which the earl covenants to convey the same manor before the feast of the Annunciation then next, To the use of

The earl in tail male, remainders over.

No fine levied in Trinity Term.

17 Sept. following. A fine was levied by the earl to sir Gilbert Gerard, and Thomas Holecroft; at the same time, the earl levied another fine to Lord Burghley and the parties to the second deed.

The uses of the first deed revoked.

^u Jones v. Morley, *supra*. Shep. T. 520.

^w See Mr. Sugden's note, *Gilb. Uses*, 111.

uses of it, the use is executed and fixed upon the levying the fine, or suffering the recovery: and no subsequent declaration is admitted to control the operation of the previous deed or instrument^x.

SECT. VII.

Of declarations
of uses.

Although the fine or recovery does not altogether correspond in circumstances with the deed or instrument leading the uses of it, if there be no subsequent declaration of the uses, the fine or recovery shall still enure to the uses of the leading deed or instrument^y.

If there be no preceding limitation of the use, the uses of the fine or recovery may be subsequently declared according to the statute of 4 Ann. c. 16. s. 15. by deed; but it is by no means certain, that such subsequent declaration may not be controlled by another averment by deed, although there be no variance in the fine or recovery^z.

The author of the Touchstone has observed (519.), “ that if the declaration be “ subsequent, if in the interim between the “ assurance had, and the declaration of the

^x Shep. T. 520. Salk. 13 Vin. 306. pl. 2. P. a. 2. 676. Tregame v. Fletcher, and the cases collected in 9 Co. 10. b. 11. a. Comb. the note.

429. 1 Atk. 9. ^z Second resolution in Tregame v. Fletcher, 2 Salk. 676. Shep. Touch. 521. 76. a. Havergill v. Hare, Vavisor's case, Dyer, 307. b. 2 Roll. Ab. 799. 1 Atk. 7.

SECT. VII. “ uses, the conuzor or recoveree sell, give or
 Of declarations “ charge the lands to others, this subsequent
 of uses, “ declaration will not subvert the mean estate,
 “ charge, or interest.”

When there are Thirdly. It sometimes happens, that in
 contradictory the same instrument there are two declara-
 declarations in tions of the use, differing from each other.
 the same instru-
 ment,

The rule is, that the first declaration shall prevail; and that the second shall be void^a. When the use is limited by the habendum of a deed, and there is in the subsequent part of the instrument a covenant to levy a fine of the same land to different uses, if the fine be levied after the seisin, out of which the uses are to arise, is transferred to the grantee, there is no ground to contend, that the use limited after the habendum can be controlled by the declaration of the use of the fine; for the deed, transferring the seisin, from which the use is to arise, is perfected upon the delivery of the deed by the operation of the statute of uses; and the subsequent fine, not operating by way of transmutation of possession, but as a confirmation, or extinguishment of right, there is no seisin to serve the use limited upon it. It is a more difficult case,

^a Southcoat v. Manory, v. Bigg, 2 Taun. 109. The
 Cro. Eliz. 744. J. C. Moor, first words in a *deed*, and
 680. by the name of Wil- the last in a *will*, shall pre-
 mot v. Knowles. See the vail. Shep. T. 88. Co.
 case of Doe dem. Leicester Litt. 112.

where the fine is levied of a term preceding the execution of the deed ; but even in this case, it should seem, that the fine would be considered merely as a further assurance, not disturbing, but by way of confirmation of, the first limitation of the use^b. The latter point, however, is extremely doubtful.

SECT. VII.

Of declarations of uses.

Fourthly. The general construction upon, and effect of, the declaration of uses.

The construction upon, and effect of, the declaration.

(1.) A very slight expression is sufficient to declare the uses of a fine or recovery ; no formal set of words being required for that purpose. Therefore, whenever the intention of the parties can be collected in the limitation of the uses of a fine or recovery upon any expression in a precedent or subsequent declaration or conveyance, such declaration or expression is sufficient to declare the uses of the fine or recovery^c : and the uses may be declared by deed indented, or by deed poll.

No formal words are necessary.

(2.) “ The declaration of the uses must be certain, and that especially in three things ;

Must be certain as to the persons, place, and estate.

^b See *Southcoat v. Manory*, cited above ; and see 22 Vin. 227. pl. (9.) 8. *Oliver v. Gyles*, Cro. Eliz. 300.

^c See 3 P.W. 208. 1 Lord Ray. 290. 12 Mod. 162. A covenant for further assur-

ance (*Hob.* 275. 13 Vin. 305. O. a. pl. 2.), or a condition of re-entry (13 Vin. 309. T. a. pl. 1.), may amount to a declaration of the use.

SECT. VII. “in the persons to whom, in the lands, &c.
 Of declarations “of which, and in the estates by which, the
 of uses. “uses are declared ; and if there want cer-
 “tainty in either of these, the declaration is
 “not good : and it must be complete in itself
 “without any reference to indentures or
 “other writings to be made afterwards, for
 “then it is but an imperfect communication,
 “and no complete declarationⁱ.”

No considera- (3.) It is not necessary, that there should
 tion necessary. be a consideration expressed in a deed to
 lead or declare the uses of a fine or reco-
 very^k.

Whether it (4.) It has been before observed, that if a
 breaks the de- man, seised on the part of his mother, had
 scent, when it made a feoffment without any consideration
 declares the use or declaration, and the use had thereupon re-
 to the recove- sulted to him in fee, or if he had expressly
 ree, or conuzor declared the use to himself and his heirs ; in
 in fee. either case the descent would not have been
 broken, but the lands would have descended
 to the heirs on the part of the mother^l. So
 if tenant in tail, who takes by *descent* from
 his maternal ancestor, suffer a recovery, and
 declare the use to himself in fee, the descent
 is not broken, and the newly-acquired fee

ⁱ Shep. Touch. 519. 6th ed.

^k See Har. Co. Litt. 123. a. note 3. 1 Ld. Raym. 290.

^l See ante, 62. 22 Vin. 185. pl. 4, 5. notes.

will descend to the heirs *ex parte materná*^m. SECT. VII.
 But here a distinction is taken— if a tenant in tail take by *purchase* under a settlement, made by his ancestor *ex parte materná*, and suffer a recovery with a declaration of the use to himself in fee, the estate in fee will descend to his heirs *ex parte paterná*ⁿ. But it should seem, that in this case, if the reversion in fee *ex parte materná* had been in the tenant in tail, a fine by him would have had a different operation, for it is the nature of a fine to let in the reversion^o. Of declarations of uses.

VIII. Upon the construction of the statute, four necessary points are to be observed for the execution of an use^p:—1st; a person *seised* to the use; 2dly; a *cestuique use in esse*; 3dly; a use in esse, *scil.* in possession, reversion, or remainder; 4thly; an estate or *seisin*, out of which the use is to arise; for the words of the statute are, that the estate of such person *seised* to the use shall be adjudged in *cestuique use*, &c. It follows, that if the above requisites do not concur, there can be no execution of the use:— and, therefore, that contingent uses, during the suspense of the contingency, cannot be executed by the statute^b. SECT. VIII.
Of uses which are not executed by the statute.

^m Roe dem. Crow v. Baldwere, 5 Term, 104. ° See 5 Term Rep. 108, 109.
ⁿ Martin v. Strachan, note (a), 5 Term Rep. 107. ^p 1 Co. 126. a.
^b Bac. Uses, 45.

SECT. VIII.

Of uses which
are not executed by the statute.

1st, Contingent
uses.

The doctrine of contingent uses is explained in the two cases of *Dillon v. Friene* (or *Chudleigh's case*) and *Wegg v. Villers*.

Chudleigh's case^c was in effect thus: A. enfeoffed B. C. D. and their heirs to the use of himself and his heirs on the body of Mary (then the wife of sir T. C.) lawfully begotten, and in default of such issue, to the use of his heirs on the body of Elizabeth (then the wife of R. B.) lawfully begotten; and in default of such issue, to the use and performance of his will for ten years immediately after his death, and after the said term ended, to the use of the said feoffees and their heirs during the life of C. C. his son, and after his death to the use of the first issue male of the said C. C. lawfully to be begotten, and to the heirs of the body of such first issue male lawfully begotten, and in default of such issue, to the use of the second issue male, &c. in like manner; and so on to the tenth issue, with several remainders over, and with the reversion in fee to the said A. Afterwards A. died without issue by either of the women; and the feoffees before the birth of the first son of C. C. enfeoffed the said C. C. to the use of himself in fee, without any consideration, but with notice of the former uses. The

^c 1 Co. 120. a.

first son of C. C. was afterwards born; and the question was, whether the feoffment destroyed the use in remainder so limited to the first son of C. C.? which question depended upon another, viz. whether before the contingency happened, i. e. the birth of the son, the use vested, and was executed in the son? It was determined by the majority of the judges, that the use before the contingency was not executed in the son; and that the feoffment entirely destroyed, and prevented the execution of the uses in contingency, although made without any consideration and with notice.

SECT. VIII.

Of uses which
are not executed by the statute.

By the arguments of the judges in this case, it seems to have been the better opinion, that upon the feoffment of A. all the uses *in esse* were immediately executed, and that there was no present actual seisin left in the feoffees, nor were the contingent uses executed: that though there was no *actual* seisin left in the feoffees after the first feoffment, yet a *possibility* of seisin remained in them to serve the contingent uses, when they should arise, or come *in esse*: that this possibility of seisin, if it had not been disturbed, would have enabled the uses, when they came *in esse*, to have been executed by the statute; but as at the time the uses came *in esse* in the principal case, the possibility of seisin was

SECT. VIII.

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are not exe-
cuted by the sta-
tute.

destroyed, that there consequently could be no seisin left to serve such uses.

In the debate upon the case of *Wegg v. Villers*, reported by Roll and mentioned hereafter, it was agreed, that if a feoffment be made to the use of A. for life, remainder to C. for life, remainder to the first son of C. in tail, with divers contingent uses in remainder, with the remainder to the right heirs of A.; in this case the feoffment of A. will not destroy the contingent uses, because though the remainder to C. was divested, yet he had a right to enter for the forfeiture, which right of entry would support the contingent uses: that if C. had made his entry either in A.'s lifetime, or after his death, that would have reduced the contingent uses; so that if a son had been born in his lifetime, the use to such son would have been executed by the statute without any entry by the first feoffees; that if C. had died leaving a son, and without having made his entry, the first feoffees might have entered, and thereby restored their seisin (*scintilla juris*) to serve the use to the son of C.

In the first edition of this work, the following case was stated. If there be a feoffment to the use of A. for life, remainder to his first son, &c. remainder over, if A., before the birth of a son, make a feoffment,

this shall divest all the estates, *but still there* SECT. VIII.
is a right of entry in the feoffees to restore the Of uses which
former estate, and upon their entry they have are not exe-
 a seisin sufficient to serve the use to such cuted by the sta-
 first son. But the case thus put, as to the tute.
 right of entry in the feoffees, and the operation of it, does not appear to be correct. For supposing the *scintilla juris* remaining in the feoffees could enable them to enter to revest the estates divested (which it will do in particular cases, as in the case previously mentioned from Roll), yet in the case here stated their entry could serve no purpose whatsoever. For there being no son born at the time of the entry, the use to such son could never be executed: according to the rule, that a contingent remainder must take effect (if at all) *eo instante*, that the particular estate determines. If indeed, as in the case from Roll, a vested estate had supported the contingent remainder, till it came *in esse*, and then the intervening tenant of the vested estate for life had died, without having made an entry, the entry of the feoffees would have supported the contingent remainder, which came *in esse* during the existence of the intervening estate. But that is different from the present case. In the case from Roll the vested estate supported the contingent remainder during its contingency, and the subsequent entry of the feoffees restored the seisin to serve the use, which *then* was *in esse*.

SECT. VIII. In the present case the general feoffees have no vested estate to preserve the contingent remainders during their contingency; but could by their entry only give such a seisin, as would *serve uses in esse at that time*; it was the want of this vested estate in feoffees (*which it was agreed in Chudleigh's case they had not*), that gave rise to the practice of inserting trustees to preserve contingent remainders. By this mode the trustees have a power to enter for forfeiture, and to continue in possession during the life of the tenant for life; and this estate, limited to them upon commission of forfeiture, has been held to be a vested estate, and will preserve the contingent uses as effectually, as the intervening estate for life in the case put by Roll, supposing the trustees in the one case, and the intervening tenant in the other, to make an *actual entry*. Indeed Mr. Fearne has endeavoured to prove, that the mere *right* of (without an *actual*) *entry* will preserve the contingent uses^e.

It will be necessary to state fully the case of Wigg and Villers^f, and the resolutions upon it.

“ If A. seised of land in fee covenants for
“ natural affection to stand seised to the use

^e See 22 Vin. 225. pl. 3.
and cases in the note.

^f 2 Roll. Ab. 796. 22
Vin. 228, 229, 230.

“ of himself for life, the remainder to his
 “ wife for life, the remainder to B. his daugh- SECT. VIII.
Of uses which
are not exe-
cuted by the sta-
tute.
 “ ter for life, the remainder to the first son
 “ to be begotten of the body of B., and after
 “ to divers other sons of B. in like manner,
 “ the remainder to his right heirs; and after
 “ A. grants his reversion in fee to J. S. to
 “ the use of J. S. and his heirs, but without
 “ any consideration, reciting in the deed the
 “ said uses, by which the grantee has conu-
 “ zance of the uses, and so he is subject to
 “ the said contingent estate, and this grant
 “ is no disturbance of them. And afterwards
 “ A. makes feoffment in fee of the land, and
 “ then B. takes baron, and has issue a son,
 “ and then A. dies, and his feme enters, and
 “ after B. dies, and then the feme dies so
 “ seised. In this case the contingent use to
 “ the first son of B. is not destroyed; but he
 “ may enter, for the feoffment of A. was a
 “ forfeiture of his estate, and of the estate
 “ of his wife in remainder during the cover-
 “ ture, so that B. might have entered for the
 “ forfeiture during the coverture; and so B.
 “ had a right of entry, which was sufficient
 “ to support the contingent remainder, to the
 “ first son, &c. without question. But the
 “ case had been more dubious, if B. had not
 “ had any estate for life; but that the con-
 “ tingent remainders had depended on the
 “ estate of the wife immediately, where the
 “ feoffment of the baron had destroyed them,

SECT. VIII. “ inasmuch as the feoffment of the baron
 Of uses which “ passed his estate, and the estate of the wife
 are not exc- “ during the coverture; so that none can
 cuted by the sta- “ enter during the coverture; and so neither
 tute, “ the estate of the baron, nor of the wife *in*
 “ *esse* during this time, to support the con-
 “ tingent uses. But this doubt does not come
 “ in question in this case, inasmuch as B.
 “ had an estate for life in remainder, which
 “ was only divested by the feoffment, and
 “ turned to a right, and she had a present
 “ right of entry for a forfeiture. And when
 “ A. the baron died, and his wife entered,
 “ this reduced her estate for life, and the es-
 “ tate of B. for her life; and so the contin-
 “ gent use reduced also; and vested, by
 “ force of the statute of uses, in the first son
 “ of B.

“ In the debate of this case between me
 “ and my brothers Nicholas and Aske, it
 “ was agreed and resolved, that if a feoff-
 “ ment be made by A. and B. in fee to the
 “ use of A. for life, the remainder to C. for
 “ life, the remainder to the eldest son of C.
 “ in tail, with diverse contingent uses after
 “ in remainder, the remainder to the right
 “ heirs of A. in fee; that in this case the
 “ feoffment of A. will not destroy the con-
 “ tingent uses, because the remainder to C.
 “ though it be divested, yet he shall have a
 “ right of entry for a forfeiture, and a right

“ to the remainder, which is sufficient to sup- SECT. VIII.
 “ port the contingent uses; for this is the Of uses which
 “ common assurance upon marriages and the are not exe-
 “ common practice. cuted by the sta-
tute.

“ And it was also agreed and resolved by
 “ us, That in the said case, if C., who is in
 “ remainder for life, enters into the land,
 “ either in the lifetime of A. or after his
 “ death, this shall reduce the contingent re-
 “ mainders, so that if a son be born in his
 “ life, his contingent estate shall be settled
 “ and executed by the statute of uses, with-
 “ out any re-entry, by the first feoffees; for
 “ this is an incident of the first livery.

“ And it was also resolved and agreed
 “ between us, That if, after the feoffment
 “ of A. if C. had not entered, but died be-
 “ fore entry, yet if the first son of C. was
 “ born in his life, he cannot enter, though
 “ his contingent estate is not destroyed, be-
 “ cause this was not executed in the life
 “ of C. ; the estate of C. being turned to a
 “ right, and so the contingent disturbed.
 “ But in this case, the first feoffees may enter
 “ to revive this contingent use, and then by
 “ their entry the contingent use shall be set-
 “ tled and executed in the first son, by the
 “ statute of uses; for there is a *scintilla*
 “ *juris* in the feoffees to enter, in such cases
 “ of necessity, to revive contingent uses; for

SECT. VIII. “ otherwise the contingent use would be destroyed.

Of uses which
are not executed by the statute.

“ It was also agreed and resolved by us,
“ That when a feoffment is made to certain
“ uses, with divers remainders over in contingency, and no estate left in the feoffees,
“ and after the feoffees enter into the land,
“ and disseise the tenant in possession, and
“ make feoffment in fee, that this does not
“ destroy the contingent uses, if the tenant in
“ possession or any in remainder, in whom an
“ estate certain was settled before the feoffment, re-enters; for his re-entry shall reduce all the contingent remainders, and
“ shall make them capable of execution by
“ the statute of uses; for the feoffees are but
“ conduits to convey the estates, and have
“ not any power left in them to destroy any
“ contingent uses.

“ It was also agreed and resolved by us,
“ That when a feoffment is made to certain
“ uses, with diverse remainders over in contingency, and no estates left in the feoffees,
“ yet if the estates *in esse* are divested,
“ either by disseisin, or by feoffment, or
“ otherwise, before the contingents happen,
“ and after the contingents happen, during
“ the divestment, and after the estates *in esse* determine before any re-entry; if the
“ feoffees release all their right in the land,

“ or make feoffment of the land, or bar their SECT. VIII.
 “ entry by any other way, in this case the Of uses which
 “ contingent can never be revived to be exe- are not exe-
 “ cuted by the statute of uses, because the cuted by the sta-
 “ feoffees, who had *scintillam juris* in them,
 “ in case of necessity to revive the contin-
 “ gent uses, have barred their entry to revive
 “ the contingent uses, and no other can re-
 “ vive them, so that they cannot be executed
 “ by the statute.”

(2.) Uses limited of copyhold lands are Uses limited of
 not within the statute of uses^e; for if such copyhold
 uses were permitted to be limited on convey- estates.
 ances of copyhold estates, there would be a
 transmutation of possession by the sole operation of the law; which would be contrary to the nature of copyhold tenure. It is a principle of that tenure, that the lands cannot be aliened without the consent of the lord.

(3.) As the statute 27 Hen. 8. c. 10. was Devises to uses.
 made previously to the statute of wills, 32
 and 34 Hen. 8., it seems to follow, that the
 former does not extend to *devises* to uses;
 for a statute cannot be considered to extend
 to any thing, which at the time of the making of it did not exist^f. But as the testa-

^e Co. Copy. sec. 54. Cro. under fol. 277. a.
 Car. 44. 2 Ves. 257.

^f Sid. 26. in *Hore v. Dix.* Uses, limited upon a sei-
 Note, 1 Co. Litt. 271. b. sin created by devise, are no
 doubt executed and become

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are not executed by the statute.

tor's intention is generally the guide in cases of devises, it has been repeatedly determin-

legal estates; and whether they be executed by the operation of the statute of uses, or by virtue of the principle of decision in courts of justice, which gives effect to the devisor's intention, is of no real practical importance. The position, however, that an act cannot extend to any thing not existing at the time of its passing into a law, is too generally stated. The author thinks it necessary to subjoin the following extracts from Vernon's case, 4 Co. 4. a. "Note, reader, in the said case reported by the lord Brook, it is further said, that a devise of land by the husband to the wife by will, is no bar of her dower, for it is a benevolence and not a jointure, *per justiciari*. as it is there reported; and that is good law, if it is well understood. And as to that, some have said, that no estate devised by will can be a jointure within 27 H. 8. c. 10., for two reasons:—1. That by the said act of 27 H. 8. the whole estate of the feoffees was transferred to *cestuique* use, and *per consequens* no land after the making of that act was devisable till the stat. 32 H. 8., and therefore a devise of land, which then by the law could not be made, cannot be

within the said act 27 H. 8. The other reason was, because every jointure intended within the act 27 H. 8. is made and assured either before or during the coverture, as appears by the said act, but a devise takes its effect after the husband's death: but that neither of these is any reason in law, appears by the resolution following, Mich. 38 and 39 Eliz. between Leak and Randall in the court of Wards, it was resolved by the two chief justices, and *tot. cur.* that if a man devises land to his wife for term of her life generally, it cannot be averred to be for the jointure of the wife, and in satisfaction of her dower, for two reasons:—1. Because a devise implies a consideration in itself; and therefore as a devise cannot be averred to be to the use of another than of the devisee, unless it is expressed in the will; no more can a devise be averred to be for a jointure, unless it is so expressed in the will: but as it is said in the said case, 6 E. 6., it shall be taken for a benevolence, and so is the said case of 6 E. 6. to be intended. 2. The whole will concerning lands by the statutes of 32 and 34 H. 8. ought to be in writ-

ed^s, that if A. devise to B. and his heirs, to the *use* of, or in trust for C. and his heirs, or in trust to permit C. and his heirs to take the profits, it shows, that the testator intended, that C. should have the *legal* estate in fee; and the law, upon this interpretation of the testator's meaning, will give the devise such an operation. But it is clear, that if there be a devise to the *use* of A. for *life*, remainder over, this cannot take effect by way of *use*, executed by the statute, because there is no *seisin* to serve the use: but still the cestuique use will have the legal estate.

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(4.) Very soon after the statute of uses an opinion was delivered, that though a feoff-

Trusts to pay over, &c.

“ing, and no averment
“ought to be taken out of
“the will which cannot be
“collected by the words
“contained in the will.
“But if a man devises land
“to a woman for term of
“her life or in tail, &c. for
“her jointure, and in satisfaction of her dower, it
“was resolved, that it is a
“jointure within the act of
“27 H. 8.: for as an estate
“for life made to a woman
“for her jointure before
“marriage, when she is not
“his wife, is within the equity of the said act, so an
“estate for life devised to a
“woman for her life, which
“takes effect after his death,
“when the marriage is dissolved, is also within the
“equity of the said act, for
“such estate well agrees

“with the intent of the
“makers of the said act of
“27 H. 8., and with the
“said description of a jointure made by the justices
“in the said case of Vernon. And although land
“was not devisable until
“32 H. 8., yet it is frequent in our books, that
“an act made of late time
“shall be taken within the
“equity of an act made long
“time before.”

Sir Edward Coke then proceeds to state several instances, establishing this construction. See also 2 lord Raym. 1028. in sir Wm. Moore's case. 2 Vin. 210. pl. 7. and note.

§ 1 Vern. 79. 415. 2 Salk. 679. 2 Atk. 573. 2 P. W. 134.

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ment in fee to the use of the feoffor for life, and after his decease that J. N. *shall take the profits*, be an use executed in J. N.; yet if it had been, that after his death the feoffees should receive the profits, and pay them over to J. N.; this would not be executed by the statute^h, because the legal estate must be in the feoffees in order to enable them to pay over the profits. This construction has since prevailed; and therefore if there be a conveyance in trust to pay over the profitsⁱ, or to convey^k, or to sell^l, &c. the legal estate must, in these cases, necessarily vest in the trustees. So it is of a trust to permit a feme covert to receive the profits for, or to pay the same to, her separate use^m.

Where a trust has been created to convey, it has been considered as a consequence, that the trustee must have a legal estate to enable him to make the conveyance, except in the case of a mere power: but it appears from a recent decision, that the rule is not universally applicable. In the case of *Doe dem.*

^h 36 Hen. 8. Bro. Feoff. al. Uses, 52. B. N. C. 282.

ⁱ Symson v. Turner, 1 Eq. Ab. 383. Silvester v. Wilson, 2 Term Rep. 444. 15 Ves. 371. and Shapland v. Smith, 1 Bro. Cha. Ca. 75. See the case of Gregory v. Henderson, 4 Taunt. 772.

^k Roberts v. Dixwell, 1 Atk. 607. Bac. Uses, 8.

^l See ante 4. Bagshaw v. Spencer, 2 Atk. 578.

^m Pybus v. Smith, 3 Bro. Cha. Ca. 340. Henry v. Purcell, Fearn, 75. Nevill v. Saunders, 1 Vern. 415. See Bush v. Allen, 5 Mod. 63.

Player v. Nicholls, 1 Barnw. and Cresswell, 336. there was a devise to trustees in trust for the testator's son, T. G. Player, of all the testator's freehold and copyhold lands ; the same to be *transferred* to him, as soon as he should attain the age of twenty-one years. It was determined, that the trustees took an estate determinable on the son's attaining the age of twenty-one years ; and Mr. justice Holroyd said, that he was very clearly of opinion, that the trustees had no legal interest in the copyholds after T. G. Player attained the age of twenty-one years.

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Although in some cases, which I shall mention in the observations which follow, the courts have considered the legal estate vested in trustees to be determinable by events, I do not remember any case, besides Doe v. Nicholls, in which this has been done, where there had been a positive direction to convey. A determinable fee ceases upon the happening of a certain event without the aid of a conveyance ; and a direction to convey a determinable fee in the event, which destroys it, would be in itself a contradiction in terms.

It is sometimes difficult to determine the extent of the legal estate vested in trustees, under trusts of the above description ; and the decided cases are not always consistent.

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tute.

The first point to ascertain in a case of this kind is, whether the trustees take a freehold or a chattel interest. In *Trodd v. Downes*, 2 Atk. 304. there was a devise to trustees and *their assigns* until R. and B. should attain the age of twenty-one years, and to receive the rents in the mean time for the maintenance of the said R. and B.; and after they should attain the age of twenty-one years, then to the said R. and B. during their lives, &c. It was determined, that the trustees took a chattel interest until R. and B., or the survivor of them, attained the age of twenty-one years.

So in *Goodtitle ex dem. Hayward v. Whitby*, 1 Burr. 228. there was a devise to T. H. and J. B. and the survivor of them, and the heirs of such survivor, in trust that they, and the survivor of them, his heirs and assigns, should lay out the rents and profits of the devised premises for the maintenance of T. and J. H. during their minorities, and when and as they should severally attain their ages of twenty-one years, then to the use of the said T. and J. H. and their heirs equally. This was determined to be an *immediate gift* to T. and J. H. with a trust to be executed during their minorities.

Upon this case, it is to be remarked, that as T. and J. H. took an immediate estate, the trustees could not take any estate of

freehold, and consequently they took a chattel interest only^a.

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In the case of Doe on the demise of White v. Simpson, there was a devise of real estate to trustees and the survivor of them, and the executors and administrators of such survivor, in trust, “*out of the rents and profits of the said estate and the arrears due,*” to pay certain annuities, and a gross sum of 800*l.*; and from and after payment of the said annuities, and the said sum of 800*l.* the testator devised the estate to his brother William for life. Lord Ellenborough said, that he and the other judges were of opinion, “that the trustees took an estate by implication for the lives of the annuitants, with a term of years in remainder for the purpose of raising the sum of 800*l.*; and that after those trusts were satisfied, the several limitations for life and in tail, took effect as legal limitations.”

There is probably some error in the report of this case, as to the expression, “*term of years.*” Lord Ellenborough, it is conceived, meant a chattel interest; for that interest,

^a The case was determined on the principle of *Boraston's case*, 3 Co. 19. b. *Mausfield and Dugard*, 1 Eq. Ab. 195. *Doe v. Lea*, 3 Term Rep. 41.

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which is in its nature uncertain, can never with propriety be called a term of years.

When it is necessary, that an estate of freehold should vest in the trustees, the general rule is, that the legal estate shall be carried so far only, as is proper to give effect to the intention of the testator^b.

In the case of *Jones v. Say and Sele*^c (which lord Kenyon said was a case by itself^d), there was a devise of manors and other hereditaments, to trustees and their heirs, in trust, out of "*the rents, issues, and profits*," to pay the several legacies and bequests therein after mentioned: then follow bequests of annuities and pecuniary legacies; and after reimbursing the costs and expenses of the trustees, and paying the annuities and legacies, in trust to pay all the residue of the rents and profits to Cecil Fiennes, during her life, for her separate use; and after her death, the trustees were to stand seised of the premises, to the use of the heirs of her body, *subject to the payment of the annuities and legacies*. It was determined, that the legal estate vested in the trustees, during the life only of Cecil Fiennes, and that the limita-

^b See *Doe dem. Woodcock v. Burthorp*, 5 Taunt. 382. *Robinson v. Gray*, 9 Fast, 1.

^c 8 Vin. 262. pl. 19. 3 Bro. Par. Ca. 113. S. C. 1 Ves. 144. S. C. cited.

^d 7 Term Rep. 654.

tion to the use of the heirs of her body carried the legal estate. SECT. VIII.

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cuted by the sta-
tute.

In *Shapland v. Smith*, 1 Br. Ch. Ca. 75. there was a devise to trustees, upon trust, that they, their heirs and assigns, should yearly by quarterly payments out of the rents, after paying taxes, pay such clear sum to C. S. for life, and after his decease, to the use of the heirs male of his body; and it was held, that the legal estate vested in the trustees during the life of C. S.^a

It is presumed, that in the cases of *Doe v. Simpson*, and *Jones v. Say and Sele*, the ground of determination was, that the words, "*rents and profits*," did not create a trust for sale of the devised estate^b; for it seems to be clear upon principle, as well as authority, that where a trust authorizes the trustees to sell, the legal estate in fee-simple must necessarily vest in them, in order to enable them to perform their trust.

In *Bagshaw v. Spencer*^c, the devise was to several trustees, their heirs and assigns,

^a See *Silvester v. Wilson*, 2 Term Rep. 444.

^b Perhaps the words, "*and arrears due*," in the one case, and "*subject to the annuities and legacies*" in the other, were considered

as explanatory of the testator's intention to confine the words, rents and profits, to annual rents.

^c 2 Atk. 570. 577. 1 Ves. 142. 144. S. C. 2 Burr. 918. S. C. cited.

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upon trust, out of the rents, or by sale or mortgage, to pay the testator's debts; and after payment thereof, the testator devised the same estates to three of the same trustees for a term of years, and after the determination of the said term, he devised the same estates to all the trustees and their heirs, upon certain trusts. Lord Hardwicke said, "The devise is to trustees and their heirs, "which carries the whole fee in law; the "devise to sell would have carried the fee, if "the word *heirs* had not been mentioned." "In the present case, the whole fee being "devised to the trustees, no legal fee could "be limited upon it."

In *Gibson v. Rogers*^a, there was a devise of freehold, leasehold, and personal estates to trustees, their "*executors, administrators,*" and assigns, in trust to pay certain annuities and legacies out of the rents and profits of the personal estate; and if that should be deficient, then out of the "*rents and profits*" of the real estate; and as to the residue of the real and personal estate, after provision for payment of the annuities and legacies, the testator gave the same to the children of Francis Gibson. Lord Hardwicke, in this case, thought, that the words *rents and profits* would authorize the trustees to sell the real

^a Amb. 93.

estate; and that the legal estate in fee-simple vested in the trustees.

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tute.

So, in the case of *Wright v. Pearson*^a, in which Henry Rayney, by his will, bearing date the 2d May 1727, devised his estate at Darsfield and Royston, in the county of York, to George Wright and Joseph Bateman, and their heirs and assigns for ever, in trust out of the rents, issues, and profits, to raise 500*l.* with interest, to be equally divided between his five grandchildren, and to be paid to them respectively at twenty-one, with benefit of survivorship; and subject thereto, to the use of his nephew Thomas Rayney, son of his sister Frances Rayney, and his assigns, for and during the term of his natural life, subject to his qualifying himself as thereafter mentioned, remainder to trustees to support contingent remainders, remainder to the use of the heirs male of the body of the said Thomas Rayney, lawfully to be begotten, and their heirs: provided that in case his said nephew Thomas Rayney should die without leaving any issue male of his body living at his death, then and in such case he subjected the premises to the payment of 100*l.* each to his two nieces Frances and Priscilla Rayney, daughters of his said sister, if then living, payable at twenty-one, with benefit of survi-

^a 1 Eden, 119.

SECT. VIII. vorship; and he enabled his said trustees, after the death of his said nephew, to raise and pay the same. Upon the question as to the legal estate, the lord keeper (Henley) made the following observations: "It is said "the trustees had only a chattel interest "*quousque* the debts are paid; and that, "subject to that chattel, this estate is executed in *Thomas*, with remainders over. "*Carter v. Barnardiston*, 1 P. W. 505. has "been quoted for this purpose. In that case "sir Michael Armine, 30th March 1668, devised, that in case his personal estate should "not be sufficient to pay his debts and legacies, then his executors should receive the "profits of his whole real estate, for the payment of his debts and legacies; and after "these should be paid, he devised, &c. The "lords, with the advice of the judges, were "of opinion, that the executors had only a "chattel interest; and *Hitchens v. Hitchens*, "2 Vern. 403. is to the same effect.

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"But these cases do not, in my opinion, "apply to the present, and warrant the conclusion; for in these two cases the estate "devised was an uncertain interest, and "therefore a chattel. But whenever a certain express interest is devised, I conceive "it not to be in the power of this court, by "construction, to make the devise pass any "other interest, than is expressed. For in-

“ stance, a man devises his lands and tene- SECT. VIII.
 “ ments to J. S. for twenty years, for the pay- Of uses which
 “ ment of his debts and legacies only, and are not exe-
 “ after payment thereof to J. B. and his cuted by the sta-
 “ heirs. After payment, this court will de- tute.
 “ clare the term to be a trust for J. B., and
 “ to be assigned accordingly; but the court
 “ cannot declare, that the term determined
 “ with payment. So if it had been a devise
 “ to J. S. for life, the court cannot make it a
 “ chattel, much less can it be done in case of
 “ a devise in fee; for such construction would
 “ change the trustees contrary to the tes-
 “ tator’s intent.

“ The testator intended, that the devisee
 “ and his heir should execute the trust; can
 “ the court say, No, we will transfer it to the
 “ executors?

“ In the case of the earl of Bath, reported
 “ by the name of *Bosworth v. Farrand*,
 “ *Carter, 97.* William earl Bath had, by
 “ fine and deed to lead the uses, limited lands
 “ to the use of Francis, lord Russel, and
 “ others, trustees, and their heirs, after the
 “ death of the earl, to raise for the daughters
 “ of lord Fitzwarren 4000*l.* apiece. The
 “ question in that case was, whether those
 “ lands were within a power of jointuring.
 “ *Bridgman, C. J.* in giving his judgment, fol.
 “ 107. says thus: ‘ I shall not need to prove

SECT. VIII. “the whole fee-simple limited to the trustees,
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 are not exe-
 cuted by the sta-
 tute. “till the portions raised, though he that
 “argued first seemed to be of opinion, that
 “all was but a chattel; but it is clear it is a
 “fee-simple. If land be conveyed to the use
 “of A. and B. and their heirs till 1000*l.* be
 “raised, it is a fee-simple conditional.’ I
 “must not construe the will in that sense,
 “for then I should make the remainders over
 “void, as nothing can be limited after a fee;
 “but I must take it as a devise to trustees of
 “a pure fee, subject to divers trusts for divers
 “persons. That reasoning was confirmed by
 “lord Hardwicke, in *Bagshaw v. Spencer*,
 “though, indeed, in that case, there was the
 “additional circumstance, that the trustee
 “might sell.”

So, in a recent case^a, there was a devise to trustees and their heirs, of real estates, in trust, to demise or let all the testator’s freehold estates for any term they should think proper, and to pay one third of the rents to the testator’s wife for life, and the remaining two third parts of such rents, and after the decease of the wife, the first mentioned one third part, to the testator’s daughter for life, for her separate use independently of her husband; and after the death of the daughter, the testator bequeathed all his

^a Doe dem. *Tomkyns v. Willan*, 2 Barnw. and Ald. 84.

freehold estates to her children, equally to be divided among them at their respective ages of twenty-one years. This was held to be a devise of the legal fee to the trustees, and not a mere power of leasing, nor a determinable fee.

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cuted by the sta-
tute.

In the late case, however, of *Warter v. Warter*, 2 Brod. and Bing. 349. the uniformity of these determinations seems to have been interrupted. In that case Thomas Meredith, by his will, dated the 8th of Sept. 1801 (after directing payment of his debts and funeral expenses), devised his capital and other messuages, tenements, lands, and hereditaments, with their respective appurtenances, charged with two annuities, to trustees, their heirs and assigns, until his nephew, John Warter, the son of his sister Margaretta Warter, should attain the age of twenty-one years; and if he should die in the mean time, until Henry Warter, the second son of the said Margaretta Warter, should arrive at that age; and, if the said Henry Warter should die in the mean time, until the daughter of the said Margaretta should arrive to that age; upon trust, among other things, to *raise* out of the rents and profits of the premises, or by *sale* or *mortgage* thereof, or of a competent part thereof, the full sum of 2000*l.*, together with all costs and charges attending the raising of the same, and to pay the same

SECT. VIII. to the said Henry Warter, the younger son of
his sister M. Warter, as soon as he attained
the age of twenty-one years; and, if his sister
should happen to have more than one younger
child, to raise out of the rents, issues, and
profits of the premises, the full sum of 3000*l.*,
and pay the same to and amongst such
younger children, share and share alike, as
soon as they should severally attain their ages
of twenty-one years; and upon further trust,
to pay and apply a proper sum of money,
arising from the rents and profits of the pre-
mises, for the maintenance and education of
his nephew, John Warter, till he should
arrive at the age of twenty-one years; and
when John Warter should attain that age, to
pay him the residue of the rents, issues, and
profits of the premises, if any should remain
after performance of the before mentioned
trusts; and if John Warter should happen to
die before he attained the age of twenty-one
years, then to pay and apply a sufficient sum
of the money arising from the rents and pro-
fits of the premises, for the maintenance and
education of his nephew, Henry Warter, till
he should attain the age of twenty-one years;
and when Henry Warter should arrive at
that age, then, upon trust, to pay him the rest
and residue of the rent, issues, and profits of
the premises, if any should remain after per-
formance of the before mentioned trusts; and,
in the mean time, to place out the money

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arising from the rents and profits of the premises, at interest, for the benefit and advantage of his said nephew; and when and as soon as John Warter should attain the age of twenty-one years, or, in case of his death, when and as soon as Henry Warter should arrive at that age, or, in case of his death, when and as soon as the daughter of Margaretta Warter should arrive at the age of twenty-one years, he gave and devised the premises, with their respective appurtenances, subject as aforesaid, to the said trustees, their heirs and assigns, to the use of his nephew, John Warter, and his assigns, for life, *sans* waste; remainder to trustees, to preserve contingent remainders; and, after the decease of John Warter, to the use of the first, second, third, and all and every other son and sons of the body of John Warter lawfully issuing, severally and successively in tail male; with remainder to his first and every other daughter successively in tail; with remainders over. John Warter died under the age of twenty-one years, leaving a widow, Jane Warter, and also Margaretta Elizabeth Meredith Warter his only child and heir at law, him surviving.

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The judges of the court of Common Pleas certified, that upon the death of John Warter under the age of twenty-one years, Margaretta Elizabeth Meredith Warter, his only child,

SECT. VIII. became, and is now, entitled to the devised estate and premises, as tenant in tail male of the *legal* estate.

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From this certificate it is clear, that the judges did not consider the legal estate in fee-simple to have been vested in the trustees, although there was an express trust to sell or mortgage. The same construction seems to have been adopted in *Hawker v. Hawker*, 3 Barn. and Ald. 527. It is possible, that in both cases the judges considered the trust to sell or mortgage, in the nature of a power; for, if a purchaser or mortgagee were to derive title from the estate vested in the trustees, under the trust to sell or mortgage, that estate must necessarily have been an absolute fee-simple: for, if the legal fee, when vested in the trustees, was in its nature determinable, the purchaser, deriving title under them, must take an estate commensurate to that, which the trustees held, and his estate would therefore be also determinable.

But where an estate is devised to trustees and their heirs, the legal fee-simple may be made determinable in a certain event, by way of executory devise: but, as lord Hardwicke observed, in the case of *Bagshaw v. Spencer*, an executory devise after payment of debts, would be void, as being too remote.

In *Wellington v. Wellington*^a, there was a devise to J. A. and J. S. and their heirs, in trust to pay E. W. an annuity of 100*l.* till the testator's debts and legacies were paid ; and after payment thereof, the testator devised to E. W. for life, &c. : and it was decided, that the trustees took a base fee, determinable on the payment of the debts and legacies out of the profits of the estate. This case, therefore, seems to be directly opposed to the opinion of lord Hardwicke in *Bagshaw v. Spencer*, and seems at variance with the acknowledged principles, by which the limits of springing uses and executory devises are fixed, by the policy of law, relating to perpetuities.

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cuted by the sta-
tute.

In the case of *Brownsword v. Edwards*^b, Francis Brownsword devised the premises in question to two persons and their heirs, to receive the rents and profits, until that little boy, commonly called John Brownsword, should attain twenty-one, which would be 14th October 1746 ; in trust in the mean time, and from time to time, to place the same out at interest for the improvement of the estate ; and if he should live to attain the said age of twenty-one, or have issue, then to the said John Brownsword and the heirs of his body : but if the said John Brownsword should

^a 1 W. Black. 645. and 4 Burr. 2165.^b 2 Ves. 243.

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tute.

happen to die before the age of twenty-one, and without issue, then in the same manner he devised it to the same persons, in trust, till that little girl commonly called Sarah Brownsword, should attain the age of twenty-one, which would be at such a time ; but if she should happen to die, &c. exactly in the same words as the former devise, then to the other collateral branches of his family ; and for want of such issue, to his own right heirs for ever.

Upon that case lord Hardwicke observed, “ Having first given the whole legal fee to “ trustees and their heirs, he did not intend “ either of these two children should have “ any thing vested till twenty-one, or the “ having issue, and then to have an estate “ tail ; consequently, as soon as John attained “ twenty-one, or had issue, though he died “ before twenty-one, that defeated and de- “ termined the estate in law given to the “ trustees, and vested a fee tail in him.”

When trustees are appointed to preserve contingent remainders, and their estate is not by express terms confined to the life of the tenant for life, after whose estate the contingent remainders are to take effect, it sometimes becomes a question, which I apprehend both in wills and deeds, is determined upon

intention, whether the trustees take the fee-
simple, or an estate *per autre vie* only.

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cuted by the sta-
tute.

In *Doe dem. Compere v. Hicks*, 7 Term Rep. 433. there was a devise of lands to A. C. for life, with remainder to John Compere for life, and after the determination of that estate to trustees and their heirs (not in words confining the estate to the life of John Compere), in trust to preserve contingent remainders; and after the decease of John Compere, to the first and every other son of John Compere successively in tail male; and in default of such issue, to Anthony C. for life; and after that estate determined, to the said trustees and their heirs, in trust to preserve contingent remainders; and after his decease, to his first and other sons successively in tail male, with remainders over. It was decided upon the ground of intention, that the trustees did not take the fee, but during the life only of each tenant for life.

In the case of *Venables v. Morris*, 7 Term Rep. 342. 439. an estate was settled by deed and fine to the use of J. M. for life, with remainder to trustees and their heirs, during the life of J. M., to preserve the contingent remainders, with remainder to H. M. for life, with remainder to trustees and their heirs (generally) to preserve contingent remainders, with remainder to the first and other sons of

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cuted by the sta-
tute.

J. M. and H. M. successively in tail, with remainder to the appointees by deed or will of H. M., and in default of appointment to her right heirs. It was determined, that, subject to H. M.'s life estate, the trustees took the absolute fee-simple; and lord Kenyon, *ibid.* 437. observes, it was absolutely necessary the trustees should take the fee; for H. M. had a power of appointment, and if in exercising that power she had introduced any contingent remainders, they might all have been defeated if the use were not executed in the trustees.

In *Boteler v. Allington*, 1 Bro. Chan. Ca. 72. there was a devise to J. B. for life, with remainder to trustees and their heirs during his life, in trust to preserve contingent remainders, with remainder to P. B. for life, with remainder to trustees and their heirs (generally) in trust to preserve contingent remainders, with remainder to the first and other sons of P. B. successively in tail male, with reversion to the testator's heirs. It seems, that the lord chancellor Thurlow considered the legal estate in fee-simple to be vested in the trustees; but lord Kenyon, 7 Term Rep. 437. has observed, "the case of *Boteler v. Allington* ought not to be relied on as an authority, because it was an amicable suit, and the bill was filed merely to remove all doubts."

Lastly, it is proper to refer to a case, SECT. VIII.
 where there was a devise to trustees and Of uses which
 are not exe-
 cuted by the sta-
 tute.
 their heirs, in trust to permit a feme covert
 to receive the rents and profits for her separate
 use for life, and after her decease, *to the use*
 of the first and other sons of her body, &c.,
 with other limitations over, in default of
 issue, for the *separate use* of other *femes*
covert; it was determined, that the legal es-
 tates *in fee-simple* vested in the trustees^v.

(5.) As the statute says, that when any Terms of years
 and other chat-
 tels.
 person or persons stand *seised* to the use of
 another, &c., it has been resolved, that a term
 of years or other chattel interest cannot be
 limited to a use^w.

(6.) When the courts of law, after the Use upon a use.
 statute of Hen. 8., took cognizance of uses,
 they held, that no use limited upon a use
 could be executed by the statute; and there-
 fore if there be a conveyance to the use of
 A. and his heirs, to the use of B. and his
 heirs, this use cannot be executed in B.^x So
 if land be limited to A. and his heirs to the
 intent *or in* trust, that B. and his heirs may
 receive a rent thereout *to the use* of C. and
 his heirs, the legal estate in the rent will

^v Harton v. Harton, 7
 Term Rep. 652. 2 Swanst.
 391. note a.

^w Bac. Uses, 42.

^x 36 Hen. 8. B. N. C.
 284. Tyrrel's case, Dyer,
 155. a. Samback v. Dalton,
 Tothil, 1 Atk. 591.

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cuted by the sta-
tute.

vest in B. by the fifth clause of the statute^y; because the seisin, out of which the rent arises, is conveyed to A., and upon the limitation of such rent to B., the statute is satisfied. There has been however an exception, and I believe only one exception, to this rule. A recovery was suffered of lands to *the use* of A. and his heirs, yielding for the same a rent to B.; it was urged, that the rent ought to have been limited out of the estates of the recoverors, and not out of the possession of *cestuique use*; yet it was determined, that the rent was well executed by the statute^z.

^y Chaplin v. Chaplin, 3 P. W. 229.

^z Cromwell's case, 2 Co. 69. b.

CHAP. III.

Of Trusts since the Statute 27 Hen. 8. c. 10.

I. THE construction adopted by the courts of law upon the statute of uses obliged cestui-que trust, entitled to a beneficial interest, not executed by the statute, to apply for redress to the Court of Chancery; and the consequence of the statute has been, that the ancient use has been abolished with its inconveniences, and a secondary use has been introduced under the name of trust, modelled by the Court of Chancery, after its own fashion, and being, as it is properly called, a creature of equity. The Chancery was aware of the mischiefs attendant upon uses before the statute; and, therefore, in exercising an exclusive control over these trusts, it has formed them, so as to answer all the contingencies of family settlements and domestic provisions. The observation, therefore, of lord Hardwicke^a, that the statute of uses “*has had no other effect, than to add at most three words to a conveyance,*” is not substantially correct; for by extinguishing the

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Of the introduction and system of trusts since the statute.

^a 1 Atk. 591.

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fiduciary existence of the use, the statute has, in effect, been the occasion of raising a system of equity, which lord Mansfield calls^b “noble, rational, and uniform,” in the place of a system at once unjust and inconvenient. “Trusts,” says his lordship, “are made to answer the exigencies of families and all purposes, without producing one inconvenience, fraud, or private mischief, which the statute of Hen. 8. meant to avoid.”

An expression is sometimes to be found in the books, that trusts are now, what uses formerly were. A use, indeed, before the statute of uses, was, as a trust since is, a fiduciary or beneficial interest, distinct from the legal estate; and so far the expression is correct: but, abstractedly no objection can arise to the essence or quality, either of the use or trust. It was the system, adopted with respect to uses by courts of justice, which gave rise to the necessity of passing the statute of uses; and the difference between uses before, and trusts since, the statute, consists in the opposite construction adopted by the Court of Chancery respecting them; or, as it has been said, “there is no difference in the principles, but there is a wide difference in the exercise of them^c.”

^b 1 Wm. Black. 160.

^c Ibid. 180.

The trust, occasioned by the statute of SECT. I.
 uses, is of a permanent and general nature, Of the intro-
 duction and sys-
 tem of trusts
 since the sta-
 tute.
 or a secondary use. But the system intro-
 duced by the Court of Chancery, relative to
 trusts since the statute, extends not only to
 trusts declared upon a legal estate in fee, but
 to those declared upon the estates of tenants
 in tail, for life and years, and to the special
 trusts before noticed.

II. A trust, generally speaking, is a right Of the trust
 estate.
 on the part of the cestuique trust to receive
 the profits, and to dispose of the lands in
 equity^d. But there may be special trusts for SECT. II.
 the accumulation of profits, the sale of es- Of the defini-
 tion and several
 kinds of trusts.
 tates, or the conversion of one trust fund
 into another, which may preclude all power
 of interference on the part of cestuique trust,
 until such special trust be satisfied; and there
 is a distinction between trusts executed and
 trusts executory.

A trust does not include every equitable Difference be-
 tween a trust
 and equity of
 redemption.
 interest. An equity of redemption is said to
 be a title in equity, and not merely a trust.
 In *Pawlett v. the Attorney-general*^e, sir
 Matthew Hale observes, “there is a diversity

^d 1 Mod. 17.

^e Hard. 465. In *Tucker
 v. Thurstan*, 17 Ves. 133.
 lord Eldon observes, that

a trust estate and an equity
 of redemption, are in many
 respects most materially
 different. See also post.

SECT. II. “ betwixt a trust and a power of redemption ;
 Of the defini- “ for a trust is created by the contract of the
 tion and several “ party, and he may direct it as he pleaseth ;
 kinds of trusts. “ and he may provide for the execution of it :
 “ and, therefore, one that comes in in the *post*
 “ shall not be liable to it, without express
 “ mention made by the party. And the
 “ rules for executing a trust have often va-
 “ ried ; and, therefore, they only are bound
 “ by it, who come in in *privity of estate*. A
 “ tenant in *dower* is bound by it, because she
 “ is in in the *per*, but not a tenant by the
 “ *curtesy*, who is in in the *post*. So all who
 “ come in in *privity of estate*, or with notice,
 “ or without a *consideration*. But a power of
 “ redemption is an equitable right inherent
 “ in the land, and binds all persons in the
 “ *post*, or otherwise ; because it is an ancient
 “ right, which the party is entitled to in
 “ equity.”

SECT. III. III. It has been intimated, that the courts
 of equity, in forming a system respecting
 the secondary use, or modern trust, occasion-
 ed by the statute of uses, have endeavoured to
 avoid the mischiefs arising from the ancient
 use. It will be now necessary to state the
 properties of the trust estate, as distinguished
 from the legal seisin of the trustee, and to
 inquire into the rules, by which trusts are
 governed.

It is a maxim generally received, that in the construction of trusts, the courts of equity adopt the rules of law applicable to legal estates. In some cases, however, the assistance of the legislature has been required to preserve the uniformity.

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(1.) If a term of years be assigned to A. in trust for B. and his heirs, the trust of the term will, notwithstanding, be personal estate in the cestuique trust, and will consequently devolve upon his executors^f. The converse of this rule is also adopted. The equitable interest in a freehold estate, cannot be so framed, as to make it go perpetually to the executor of cestuique trust, as personal estate.

Limitations of trust estates.

In the case of trusts executed, words of limitation, which if applied to real property would create an estate tail, will also create an estate tail in the trust or beneficial interest^g; and, therefore, the rule of law will prevail, although the intention of a testator, in the case of wills, may be inferred to the contrary, by his expressly restraining the

Estates tail.

^f See 1 Vern. 164. and Hunt v. Baker, 2 Freem. 62.

^g "In limitations of a trust either of real or personal estate, the construction ought to be

"made according to the construction of limitations of a legal estate." Per lord Hardwicke, in Garth v. Baldwin, 2 Ves. 646. 655.

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equitable estate of the first taker, to an estate for life^h, or by making it unimpeachable for wasteⁱ, or by using the word *issue*^k, instead of the word heirs of the body, or by granting to the first taker a power of leasing^l, or by introducing a limitation to trustees to preserve contingent remainders^m, or by adding after a limitation “to the heirs “male of the body” of the first taker, words, which denote an intention, that such heirs male should take in succession according to seniority of ageⁿ.

Descent of trust estates.

(2.) Trust estates descend according to the rule of descents of legal estates; and, therefore, in the case of gavelkind and borough-english lands, trusts affecting them will descend according to the descendible quality of the tenure^o. There shall be a *possessio fratris*^p of a trust; and where the ultimate limitation of a trust is to the right heirs of the

^h Shaw v. Weigh, 1 Eq. Ab. 184. pl. 28. 3 Vin. 257. pl. 25, 26. S. C.

ⁱ Ibid. Jones v. Morgan, 1 Bro. Cha. Ca. 206.

^k Shaw v. Weigh, supra.

^l Bale v. Coleman, 1 P. W. 142.

^m Jones v. Morgan, supra. Poole v. Poole, 3 Bos. and Pull. 620. Wright v. Pearson, Amb. 358. and S. C. Fearne. Austin v. Taylor, Amb. 376.

ⁿ Ibid. See the case of

Brandon v. Robinson, 18 Ves. 429. An equitable tenancy for life must be subject to all the incidents of a legalestate, notwithstanding any restriction upon the tenant for life, against alienation, not amounting to a limitation over.

^o 2 Ves. 304. in the case of Fawcet v. Lowther, Jones v. Rensbie, 22 Vin. 185. pl. 7.

^p 2 P. W. 713. 736.

person creating or conveying it, the heirs will take by descent, notwithstanding the grantor has no particular estate⁹.

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(3.) Not only a trust *in esse*, but the possibility of a trust, may be assigned in equity^r; and it has been determined^s, that a husband may dispose of the trust of a term, to which he is entitled in right of his wife; and it should seem, that in case the husband shall survive his wife before such disposition made by him, he will be entitled to the trust upon the survivorship, without taking out letters of administration to the wife^t.

Trust estates may be conveyed.

(4.) A trust may also be devised^u, with the solemnities required by the statute of frauds upon the devise of legal estates^v; and as copyhold estates are not within that statute, trusts declared upon them will pass by an unattested will^w.

Trust estates may be devised.

⁹ *Godolphin v. Abington*, 2 Atk. 57. Watk. Descent, 264. See ante 64. note a. as to uses *before* the statute.

^r *Warmstrey v. Tanfield*, 1 Cha. Rep. 29. 1 Cha. Ca. 8. See cases collected in note 21 Vin. 516. pl. 1.

^s *Tudor v. Samyne*, 2 Vern. 270. *Bates v. Dandy*, 2 Atk. 208. note 1.

^t *Pale v. Michell*, 2 Eq. Ab. 138. pl. 4.

^u See *Fearne*, 539. 1 Cha. Ca. 211. in *Cornbury v. Middleton*. 2 Vern. 680. in *Greenhill v. Greenhill*.

^v *Wagstaff v. Wagstaff*, 2 Cox's P. W. 258. note 1. *Adlington v. Can*, 3 Atk. 151.

^w *Tuffnell v. Page*, 2 Atk. 37. note 2. last edit.

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Execution may issue upon the trust estate.

(5.) By virtue of the statute of frauds, trust estates are made liable to executions upon judgments, statutes, and recognizances^x.

Upon the construction of this statute it has been determined, that it does not authorize, either the trust^y or the equity of redemption^z of a term of years, to be taken in execution, under a fieri facias at the suit of a judgment creditor.

The ground upon which the court of King's Bench in *Scott v. Scholey*, 8 East, 467. determined, that the trust of a term of years could not be taken in execution upon a *feri facias*, appears to have been, that the words "*lands, tenements, &c.*" in the statute of

^x 29 Car. 2. c. 3. s. 10.
 " it shall be lawful for every
 " sheriff or other officer to
 " whom any writ or pre-
 " cept is or shall be direct-
 " ed, at the suit of any per-
 " son or persons, of, for,
 " and upon any judgment,
 " statute, or recognizance
 " hereafter to be made or
 " had, to do, make, and de-
 " liver execution unto the
 " party in that behalf suing
 " of all such lands, tene-
 " ments, rectories, tithes,
 " rents and hereditaments,
 " as any other person or
 " persons be in any manner
 " of wise seised or pos-
 " sessed, or hereafter shall
 " be seised or possessed, in

" trust for him against whom
 " execution is so sued, like
 " as the sheriff or other of-
 " ficer might or ought to
 " have done, if the said
 " party against whom exe-
 " cution hereafter shall be
 " so sued, had been seised
 " of such lands, tenements,
 " rectories, tithes, rents, or
 " other hereditaments of
 " such estate as they be
 " seised of in trust for him
 " at the time of the said
 " execution sued."

^y *Scott v. Scholey*, 8 East, 467.

^z *King v. Marissal*, 3 Atk. 192. *Burden v. Kennedy*, 3 Atk. 739. *Lyster v. Doland*, 1 Ves. jun. 431.

frauds, were considered by the court as not extending to leases for years, which are a mere chattel interest saleable at common law under a *venditioni exponas*. Lord Ellenborough observes, “ Lord Thurlow was at last “ of opinion, that an equity of redemption of “ a term could not be taken in execution ; “ though at first, under an apprehension that “ the 10th sect. of the statute of frauds applied to such a case, he had inclined to “ hold otherwise. But the very silence of “ that statute, which, while it expressly introduces a new provision in respect to *lands and tenements* held in trust for the person, “ against whom an execution is sued, says “ *nothing as to trusts of chattel interests*, affords a strong argument, that those interests were meant to continue in the same “ situation and plight in respect of executions, “ in which both freehold and leasehold trust “ interests equally stood prior to the passing “ of that statute.”

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So it was determined in *Rose v. Bartlett*, Cro. Car. 292. that, when a person having freehold and leasehold estates, devised all his “ *lands and tenements*,” the leaseholds did not pass.

In the late case, *Doe dem. Hull v. Greenhill*, 4 Barnw. and Ald. 684. a question arose, whether an ejectment against the cestuique

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trust of a term of years could be supported by the plaintiff, who claimed under a judgment recovered against the defendant, and a writ of *eligit*, and inquisition thereon taken and returned; but it does not appear from the report, that the question, whether the statute extended to the equitable interest of a term of years, was particularly discussed; and it may be proper here to mention, that the statute of Westminster (13 Edw. 1. c. 18.) allows the plaintiff in an action of debt or for damages, either to have a writ of *fieri facias* directed to the sheriff, “or that the “sheriff shall deliver to him all the chattels “of the debtor (saving only his oxen and “beasts of his plough) *and the one half of “his lands*, until the debt be levied upon a “reasonable price or extent:” and upon these words, *medietatem terræ suæ*, says sir Edward Coke (2 Inst. 396.), “the sheriff hath extended a term of years.” This seems to be an authority, that the word, “*lands*,” in the statute of Westminster 2. extends to leases for years^a.

^a In sir Gerard Fleetwood's case, 8 Co. 171. a. it is said to be at the election of the sheriff to extend or sell a lease: and in *Hungry v. Fry*, Moor, 341. pl. 462. “after an *elegit*, and “execution thereupon of “*lands*, the plaintiff may

“have other *elegit* of a “*term of years* or *goods*: “which expression seems “to distinguish between “*lands* and *leases*.” Upon this subject, see *Dyer*, 363. a. pl. 24. *Palmer's case*, 4 Co. 74. and *Rex v. Rawlins*, Bunb. 71.

In the case of *Lyster v. Dolland*^a, lord Thurlow is reported to have said, “If this
 “had been a mortgage in fee, he could only
 “have extended it to hold *quousque*.”

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But it seems impossible to contend, that under the statute of frauds the sheriff can deliver an equity of redemption upon an execution in a suit against the mortgagor: and in the case of *Plunkett v. Penson*^b, lord Hardwicke is stated to have said, “I should be
 “glad to be informed, whether there is any
 “instance, where an equity of redemption
 “has ever been held to be liable to the execution of a bond creditor in the life of the
 “mortgagor:” to which the counsel in the case made answer, they could not recollect any instance, where it had been so held.

From the case of *Hunt v. Coles*, Com. Rep. 226. it appears, that under this statute, a judgment is not a lien upon the trust estate; and, therefore, that a purchaser for a valuable consideration and without notice, obtaining a conveyance of the legal estate from the trustee, and of the equitable interest from the cestuique trust, will not be bound by a judgment previously entered up against the cestuique trust.

^a 1 Ves. J. 431.

^b 2 Atk. 290.

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Assets.

(6.) Previously to the statute of frauds, 29 Car. 2. c. 3., the trust of an estate in fee-simple was not assets at law, or in equity, in the hands of the heir of the cestuique trust to satisfy bond debts^b; but by the 10th section^c of that statute, the trust is now made legal assets^d. An equity of redemption is not considered a trust within the statute; and therefore, it has been determined to be equitable, and not legal assets^e.

It seems, that both previously to and since the statute of frauds, the trust of a term of years was considered as equitable assets in the hands of the executor^f; and the statute does not now make it legal assets^g;

^b See Bennett and Brownlow, Cha. Ca. 12. 3 Vin. 142. pl. 10, 11. and the cases collected in the notes.

^c "And if any cestuique trust hereafter shall die, leaving a trust in fee-simple to descend to his heir, then and in every such case, such trust shall be deemed and taken, and is hereby declared to be assets by descent, and the heir shall be liable to, and chargeable with, the obligation of his ancestors for and by reason of such assets, as fully and amply as he might or ought to have been, if the estate in law had

descended to him in possession in like manner as the trust descended, any law, custom, or usage, to the contrary in any wise notwithstanding."

^d King v. Ballet, 2 Vern. 248. See Robinson v. Tong, 3 Vin. 145. pl. 28. as to the trust of an advowson in gross.

^e Plunket v. Penson, 2 Atk. 290.

^f 3 Cha. Rep. 37. in Attorney-general v. Sands, 21 Car. 1. Sir Chas. Cox's case, 3 P. W. 341. Hartwell v. Chitters, Amb. 308.

^g King v. Ballet, supra.

except in the case of a term of years attendant upon the inheritance, in which case the term becomes consolidated in equity with the freehold^h.

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(7.) It is apparent from the necessity, which produced the statute of frauds, that the legal estate vested in the trustee, could not be taken in execution upon a judgment against the cestuique trust: but it seems, that the lands of cestuique trust were always held liable to an extent for a debt due to the kingⁱ. Sir Matthew Hale observes, that this rule was adopted "*per cursum scaccarii*, which makes the law in such cases^k."

The statute of 13th Eliz. c. 4. s. 5. which relates to accountants to the crown, extends to trusts by express words; and not only a trust, but an equity of redemption^l, may be sold under an extent issued against an accountant, by virtue of the statute of the 25 Geo. 3. c. 35., which, in order to facilitate the payment of debts due to the crown, authorizes the Court of Exchequer, in a

^h 2 Cha. Ca. 152. in Ratcliff v. Graves, 35 Car. 2. This rule, which does not require the aid of authority to support it, was, however, formerly subject to controversy. See 3 Vin. 143, 144. pl. 16. 20. and the va-

rious cases collected in the notes.

ⁱ Walter de Chirton's case, Dy. 160. a. 24 Edw. 3. 16 Vin. 521. K. pl. 1. notes.

^k Hard. 495.

^l The King v. De la Motte, Forest, 162.

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Forfeiture for treason.

summary way, to direct the extended lands of an accountant to be sold.

(8.) At the common law, a trust in fee-simple or in tail, was not forfeited to the crown by the attainder of cestuique trust for treason^m; but the statute 33 H. 8. c. 20. s. 2. (which extends to all manner of treasonsⁿ), includes trust estates^o, and also extends to an equity of redemption^p.

The ground of this latter decision is, that the statute of treasons above noticed, has the word *conditions*; so, that if a mortgage in fee be made subject to a condition of re-entry, and the mortgagor commits treason before the day of payment, the king, by the forfeiture, shall have the benefit of the condition; and if the estate shall become absolute in the mortgagee in consequence of the non-payment of the mortgage-money, an equity attaches upon the mortgagee, in favour of the crown upon the same principle, that it would have attached in favour of the mortgagor, in case he had not committed treason.

It is said, that a cestuique trust of a term of years forfeits it for felony, and upon an outlawry in a personal action^q.

^m See Jenkins, 190. Hard. 495.

ⁿ 3 Co. Rep. 11. a.

^o Hard. 495.

^p Attorney-general v. Crofts, 4 Bro. P. C. 136.

^q Earl of Somerset's case, Hob. 214. Jenk. 190. Hard. 490.

(9.) In the marquis of Winchester's case^r, SECT. III.
 it is said, "that although an use were an hereditament (for there shall be a *possessio* In what cases trusts are governed by, or similar to, the laws relative to legal estates.
fratris of it), yet, by the general words of "all hereditaments, an use was not given to the king by an act of attainder." It has, however, been determined in the modern case of *Shrapnel v. Vernon*^s, that an equity of redemption was within the 8th section of 17 Geo. 3. c. 26., which does not comprise either the word trust or condition. In that case lord Thurlow said, "In many acts of parliament an equitable estate is considered the same, as if it were a legal estate; the words, seised in law or in equity, in the qualification act, show, that the word *seised* is applicable to both." He adds, "The only question is, whether the word *seisin* will extend to being seised of an estate in equity, which, unless I am mistaken in point of law, it will." Equitable estates considered as legal, in the construction of acts of parliament.

(10.) There may be a tenant by the curtesy of a trust of inheritance^t, unless the husband is excluded by an express trust for

^r 3 Co. 2. b. and see *ibid.*
 10. b.

Amhurst v. Skinner, 12 East, 263.

^s 2 Bro. Cha. Rep. 268.
 and see also *Tucker v. Thurston*, 17 Ves. 131.

^t *Watts v. Ball*, 1 P. W. 108. *Chaplin v. Chaplin*, 3 P. W. 234. *Casborne v. Scarfe*, 1 Atk. 603.

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Tenant by the curtesy.

the separate use of his wife; as where lands were devised to trustees and their heirs, in trust for the separate use of the testator's daughter during her life, and after her decease, for such persons to whom she should devise the same; lord Hardwicke decreed, that the husband should not have his curtesy^u.

Statutes of limitations.

(11.) The statutes of limitations, 32 H. 8. c. 2. and 21 Jac. 1. c. 16., expressly extend to actions and proceedings in courts of law; and, consequently, they do not in terms apply to suits in equity. But, as the Master of the Rolls, in *Beckford v. Wade*^v, observes, "Courts of equity, by their own rules, independently of any statutes of limitation, give great effect to length of time; and they refer frequently to the statutes of limitation for no other purpose, than as furnishing a convenient measure for the length of time, that ought to operate as a bar, in equity, of any particular demand."

So in *Llewellyn v. Mackworth* mentioned in the note to 15 Vin. 125. pl. 1. lord Hardwicke observes, "The rule in this court, that the statute of limitations does not bar a

^u *Hearle v. Greenbank*, 3 Atk. 695. 716. *Smith v. Clay*, 3 Bro. Cha. Ca. 639. in note. *Amb.*

^v 17 Ves. 87. 97. 15 Ves. 496. See upon this head, 645. S. C.

“trust estate, holds only as between cestuique SECT. III.
 “trust and trustee, not between cestuique In what cases trusts are governed by, or similar to, the laws relative to legal estates.
 “trust and trustee on one side, and strangers
 “on the other; for that would be to make
 “the statute of no force at all; because
 “there is hardly any estate of consequence
 “without such trust, and so the act would
 “never take place. Therefore where a ces-
 “tuique trust and his trustee are both out of
 “possession for the time limited, the party
 “in possession has a good bar against them
 “both.”

In the late case of the marquis of Cholmondeley v. lord Clinton, in the House of Lords (2 Jacob and Walk. 192.), there is an important observation by lord Redesdale; it Writs of right and formedon. had been argued in that case, that the marquis of Cholmondeley might at law have had a writ of right; but his lordship remarked, that that was a writ to which particular privileges were allowed, but that courts of equity never regarded that writ, or writs of formedon, or others of the same nature; that they had always considered the provision in the statute of James, which applied to rights and titles of entry, and in which the period of limitation was twenty years, as that, by which they were bound, and it was that, upon which they had constantly acted.

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Length of time and adverse possession will also, by analogy to the statutes of limitation, bar the equitable owner of a term of years assigned to attend the inheritance. If an estate be purchased by A. B., and an outstanding term be assigned to C. D., in trust for A. B. his heirs and assigns, and to attend the inheritance, the term is identified with, and follows, the possession. A. B. takes possession not as cestuique trust of the term, but as owner of the freehold and inheritance of the estate, subject to the term; and if the inheritance or freehold, subject to the outstanding term assigned previously to the controverted rights, to attend the inheritance, be contested between two claimants, the question is tried at law in respect of the freehold, independently of the outstanding term; and the preliminary step always has been by a bill in equity to prevent the term from being set up against, or in favour of, either of the claimants: and I do not know of an instance, in which a bill under the above circumstances, has been filed against the trustee of the term for the purpose of constituting him a trustee against the person in possession of the estate, who would have been the owner of the freehold at law, in case no term had subsisted. In *Llewellyn v. Mackworth* before mentioned, and as reported by Barnardiston, 449. lord

Hardwicke observes, "There is hardly any
 "ancient family, but there are long terms in
 "the hands of trustees, and if strangers
 "might be allowed to lay claim to them
 "after any length of time, it might be greatly
 "inconvenient."

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The reasoning, with respect to an estate, subject to a term assigned to attend the inheritance, will apply to an estate, subject to a term of years, for securing to a mortgagee a sum of money. The right to redeem the mortgage will follow the right to the reversion in fee, expectant on the mortgage term; for the person in possession, unless precluded by positive contract, does not claim the estate as cestuique trust of the term, subject to the mortgage, but as owner of the estate, subject to the term, and the money secured by it. If the person in possession insists upon his right to the freehold under the statute of limitations, and if that right is established at law, the right to redeem the mortgage must necessarily follow it. This point has been recently settled in the case of the marquis of Cholmondeley v. lord Clinton; first by sir Thomas Plumer in a very able argument^a, and afterwards by the House of Lords^b.

(12.) Where the legal estate is vested in a Non-claim on fines.

^a 2 Jacob and Walker, 1.

^b Ibid. 190.

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trustee in fee-simple, it appears, that non-claim on a fine levied by a stranger having, and continuing in, the possession, will be a bar to the original *cestuique trust*. In *Willis v. Shorrall*, 1 Atk. 474. lord Hardwicke says, “No doubt the rules of this court (Chancery) “with relation to fines, have been taken from “the rules at law, and the effect is the same “with regard to equitable interests, if of “such a nature, that turned into a legal interest, it would have been barred.” So in *Wolstan v. Aston*, Hard. 511., sir Matthew Hale observes, that a fine with proclamations according to the 4 Hen. 7. would, if levied by a stranger, bar a trust. This principle of construction has been adopted in many cases^a.

The case of *Basket v. Pierce* is thus reported, 1 Vern. 226.: A man, by his will, devises his lands to trustees for ninety-nine years, for the payment of his debts and legacies, and afterwards, in case they should not act and take upon them the trust within six months after his death, then he devised the said lands to another and his heirs, in trust to pay his debts and legacies, and afterwards to A. in tail, remainder in tail to B. A.

^a See *Thynne v. Cary*, Bagot, 1 Cha. Ca. 278. 2
sir William Jones, 416. Swanst. 603. from lord
Gifford's case, 1 Freem. 311. Nottingham's manuscripts.
Clifford v. Ashly, 1 Cha. Stapleton v. Sherrard, 2
 Ca. 268. *Salisbury v.* Vern. 212.

levies a fine, and dies without issue. Five years pass, and *non-claim*.

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The question was, whether the fine by *cestuique trust* in tail, and *non-claim*, should bar the remainder-man in tail? And the lord keeper was of opinion, that it should: for equitable rights are as well to be barred by *fin*es, as actions and titles at law.

It appears, however, that the point was not expressly determined; although the opinion of the lord keeper has been considered as an authority in subsequent cases. See 1 Eq. Abr. 256. and 9 Mod. 144. In the latter, the case is cited in the following manner: “The testator devised his lands to trustees “for ninety-nine years, for the payment of “his debts; and if they did not act, then he “devised the lands to J. S. and his heirs, in “trust to pay his debts; and afterwards to “A. B. in tail, remainder in tail to E. G. “Afterwards A. B., who was the *cestuique trust* in tail, levied a fine, and died without issue; and five years passed without any claim: it was decreed, that this fine and non-claim barred the remainder-man in tail; for equitable rights are bound by fines, as well as actions and titles at law; and though it was insisted for the plaintiff in that case, that the title of the remainder-man was not yet commenced, because the

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“debts were not paid, and the term for 99 years was subsisting; and that the entire estate at law being in the trustee, he ought to have entered; and that it was against equity for him to suffer the *cestuique trust* to be barred by a fine and non-claim through his default; yet the court was still of opinion, that the plaintiff was barred.”

Notwithstanding the opinion of the lord keeper in the case above mentioned, there seems at present to be a diversity of opinion upon the question, whether non-claim upon a fine levied by *cestuique trust* for life or in tail, can have any effect upon the equitable remainder; it being contended, that a fine by a legal tenant for life or in tail, has effect upon the remainder, in consequence of its displacing or discontinuing such remainder; and that a fine upon an equitable estate can have no such operation. It is argued, that there is no similarity of operation in a fine acting on the legal estate for life or in tail, and a fine acting upon an equitable estate to the same extent. But I know of no case, where the operation of fines at law and in equity is similar. The fine of an equitable tenant for life is absolutely void at law; and then how can it bear any similarity of operation in equity?

It appears to me, that the system of equity, with respect to the construction of fines, is raised, not from any similarity of operation in fines at law and in equity, but as a rule of convenience, with a view to make the systems of law and equity as analogous, as the nature of the subjects will allow. It is a system grounded on analogy, and not on similarity of operation. To illustrate this it may be said, that if A. an equitable tenant for life in possession, levy a fine, and die, and five years non-claim pass, the court of Chancery would consider the person in remainder barred, because the fine would have had that operation, if levied by tenant for life in possession of the legal estate; but if an equitable estate be settled upon A. for life, with remainder to B. for life, with remainder to C. in fee; and if B. the tenant in remainder, should levy a fine, and five years non-claim should pass after the deaths of A. and B., the claim of C. would not be barred; because the fine would not have barred, if levied by a tenant for life in remainder of the legal estate.

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The construction, that a fine by an equitable tenant for life does not create a forfeiture, is an exception to a general rule, springing from an obvious principle of justice. Forfeitures are not favoured, either at law or in equity; and as an equitable fine is a mere creature of Chancery, having no operation at

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all beyond what it receives from that court, with a view to make the rules of law and equity analogous, it would be a narrow view of the subject, which, in order to preserve the analogy, should extend it to a forfeiture, which the fine could not in fact create.

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IV. But the rule, that equity follows the law, has its exceptions; and in some instances the peculiarity of trusts bears no analogy to the system of property at common law.

Dower.

(1.) Although the trust of an estate of inheritance is subject to curtesy, it is not to dower^a. It must be admitted, that there is an apparent inconsistency in this distinction; but it was adopted from motives of convenience, and not from principle. Purchasers by the advice of conveyancers, who had formed their opinion upon trusts from the ancient use, having taken their conveyances in the names of trustees for the purpose of barring dower, the courts of equity protected the purchaser at the expense of the wife's equitable right^b.

Escheat.

(2.) The trust of an inheritance will not escheat to the lord upon the attainder of ces-

^a *Colt v. Colt*, 1 Cha. Rep. 254. *Bottomley v. Fairfax*, Prec. Cha. 336. *Godwin v. Winsmore*, .2

Atk. 525. *Dixon v. Saville*, 1 Bro. 326.

^b See 1 Wm. Black. 182.

cestuique trust for felony, or for want of heirs^c; because upon the attainder or death the trust is absolutely determined.

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In King and Holland, cited in Hard. 436. and reported in Alleyne, 14. the case was, that Holland had purchased a copyhold estate in fee, in trust for an alien; and upon office found, the King seized, to have the profits answered to him: and *per cur.* the trust was not forfeited, and an *amoveas manum* was granted. The reason for the decision is stated to be, that the lord would otherwise be prejudiced by losing his services and fines.

In the case of outlawry in personal actions, the king is at law entitled to the rents and profits of the offender's real estate, although he has no interest in the lands themselves^d; and in King v. Holland, Style, 41., it is said, the king shall not have the profits of the land upon an outlawry against the cestuique use, or cestuique trust. The reason of this seems to be, that at law the profits belong to the trustee, and the outlawry cannot affect him.

(3.) In the case of a direct trust, as where an estate is conveyed to the use of A. and

The effect of length of time between trustee and cestuique trust.

^c Burgess v. Wheate, 1 Wm. Black. 123. Sandys' case, Hard. 408.

^d Vi. T. Jones, 100. Peyton v. Ayliffe, 2 Vern. 312.

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his heirs, in trust for B. and his heirs, no time, as between the trustee and cestuique trust, can operate as a bar to the equitable rights of the latter^d; for between him and his trustee, there is no adverse possession. If the trustee acquires the actual possession, it is still for the benefit of the cestuique trust. The converse of this rule will also hold: for the possession of the cestuique trust does not divest the legal estate from the trustee. A conveyance of the legal estate by the trustee, or, as lord Hardwicke seems to have thought^e, a disseisin or actual ouster of the trustee by the cestuique trust, may indeed be presumed from length of possession, or, under particular circumstances; but time alone does not destroy the legal interest of the trustee.

As to a mere constructive trust, there is no doubt, that long acquiescence may bar the equitable claims of the cestuique trust^f; and it has often been determined, that a mortgagor may be deprived of his equity of redemption after a possession by the mortgagee for 20 years without any claim, or assertion of title, on the part of the mortgagor^g.

^d Barn. 449. *Townshend v. Townshend*, 1 Bro. C. C. 551.

^e 1 Ves. 435, 436. in *lord Portsmouth v. lord Effingham*. See *ibid.* 432.

^f See 17 Ves. 97. and the case of *Bonny v. Ridgard*

there cited. *Townshend v. Townshend*, 1 Bro. C. C. 551. See also 17 Ves. 165. *Chalmer v. Bradly*, 1 Jacob and W. 51.

^g 17 Ves. 99. *Anon.* 2 Atk. 333. *Aggas v. Pikerell*, 3 Atk. 225. See

In the case of *Fenwick v. Reed*, 1 Mer. 114. 124, 125. lord Eldon has observed, that it is clearly settled, that length of time in the case of the *vivum vadium*, or Welch mortgage, would be no bar to redemption, unless it were proved, that the party had held over for the space of 20 years after the debt was fully paid; and that length of time, under such circumstances, might be set up as a bar in the case of a Welch mortgage, as in the case of an ordinary mortgage.

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(4.) A fine levied by a trustee cannot prejudice the equitable interest of his *cestuique* trust, unless it be levied to a purchaser without notice^b; and as *cestuique* trust, entitled to the equitable inheritance, is considered at law merely as tenant at will to his trustee, a fine levied by him will not divest, or prejudice, the legal estateⁱ.

Of a fine and non-claim.

But where a term of years is assigned to a trustee to attend the inheritance, and the owner of the inheritance conveys by fine to a purchaser without notice of the term, it is said, that the non-claim upon the fine will bar the legal interest in the term^k. It is

Lake v. Thomas, 3 Ves. 17.
See *Hodle v. Healey*, 1 Ves. and B. 536. *Cooper*, 1. *Whiting v. White*, Reeks v. *Postlethwaite*, *Cooper*, 161. *Barron v. Martin*, *Coop.* 189.

^b See *Gilb. Cha.* 62.ⁱ See *earl of Pomfret*, v. *lord Windsor*, 2 Ves. 472. 481.^k *Ischam v. Morris*, as cited 2 Vent. 329. 3 Bac. Ab. 443.

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clear, however, that when the fine is levied to the use of the conuzor, or indeed to a purchaser, who takes an assignment of the outstanding term to a trustee named by himself, or where the term is antecedently charged, by way of security, with payment of a sum of money, the legal estate vested in the trustee would not be affected by the fine¹.

Terms attendant upon the inheritance.

(5.) Although the trust of a term of years in gross cannot be so limited, as to make it descendible as real estate; yet when the *cestuique trust* of the term is also the beneficial owner of the immediate inheritance in fee-simple, the term becomes consolidated with, or attendant upon, the inheritance. If the legal interest in a term of years becomes vested in the person legally entitled to the immediate reversionary freehold, the term becomes merged at law by the union: and by analogy to this rule, the Court of Chancery has determined, that where the owner of the legal estate of inheritance is entitled to the equitable interest in a term of years, of which the legal estate is vested in a trustee, and the term of years, if legally vested in the owner, and not in his trustee; would at law have become merged, the equitable interest in the term will become consolidated with the

¹ The reader will find all "Leases and Terms for the cases upon these points "Years," (Q.) 3 vol. 448. collected in Bac. Ab. tit.

inheritance, and will follow the limitations of it^m; or, to use the expression of sir Matthew Haleⁿ, the equitable interest in the term "is" "no more than a shadow, an accessory" to the inheritance. It will belong to the heir or devisee^o; it will be real assets^p; it will, as against the heir^q or assignees of a bankrupt^r, be subject to dower, and for the same reason to curtesy; it will not be forfeited for the felony of *cestuique trust*^s; and it will not pass by a will, not attested by three witnesses^t.

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A term may become attendant upon the inheritance, without any express declaration for that purpose, either where the legal interest in the term is vested in the trustee, and the legal freehold in the owner of the inheritance, or where the owner is beneficially or equitably entitled to the inheritance, and is legally possessed of the term, or where the legal estate, both of the term and the inheritance, is vested in trustees^u.

But although a term may become attendant upon the inheritance, the beneficial owner

^m Best v. Stamford, Prec. Cha. 252. 2 Freem. 288. S. C.

ⁿ Hard. 494.

^o 3 Cha. Rep. 37.

^p Ante, 276, 277.

^q Wray v. Williams, Prec. Cha. 151. 1 P. W. 137.

^r 9 Vin. 227. pl. 60. Squire v. Compton.

^s Attorney-general v. Sandys, Hard. 488. 3 Cha. Rep. 33.

^t Whitchurch v. Whitchurch, 2 P. W. 236.

^u See Cooke v. Cooke, 2 Atk. 67. and notes to the last edition. Collect. Jur. 273.

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may destroy the equitable union^w. “A trust
“of a term, that follows the inheritance, may
“be resembled to a box of charters, which
“shall go to the heir with the lands; but
“if the owner grant them over, then they
“shall go to the executors of the grantee^x.”

I have already stated, that when the equitable interest in the term is vested in the person, who is entitled to the immediate reversion in fee-simple, it is not necessary, that there should be an express declaration to make the term attendant upon the inheritance^y. The consolidation of the equitable interests arises from a rule of equity adopted for the protection of real property. It is difficult therefore to understand the ground, upon which the case of *Scott v. Fenhouillet*^z is said to have been determined. In that case, there appears to have been a legal interest of a few days dividing the term of years, upon which the question arose, from the inheritance; so that if the legal interests of that term and of the inheritance had been united in one person, there would not have been a merger at law, on account of the intervening term; and lord Thurlow is reported to have said, that whether the term would, or would

^w *Hayter v. Rod*, 1 P. W. 376. 1 Term Rep. 770.

^x *Hard*, 496.

^y See *Tiffin v. Tiffin*, 1

Vern. 1. *Dowse v. Derivall*, *ibid*. 104. *Goodright v. Sales*, 2 Wils. 329.

^z 1 Bro. Cha. Ca. 69.

not, merge, an express declaration would make it attendant. Now if, in that case, the owner of the inheritance was entitled to the *beneficial* interest in the intervening, as well as in the other term, then he had a right to direct an assignment of both; and consequently, as he might, in that case, have caused the merger of them at law, the equitable interests must, according to the rule just noticed, have become attendant upon the inheritance, without the necessity of an express declaration. But if the beneficial, as well as the legal interest, in the intervening term, was outstanding in a third person, I am not aware of any rule of construction, upon which it can be admitted, that the express declaration of the parties could make the term attendant. Mr. Fearne^a, in considering this case of *Scott v. Fenhouillet*, expressly states it to be his opinion, that, if there had been such intervening term, the declaration of the trust of the term to attend, could not have made it so: and his opinion was, no doubt, grounded upon the principles, which I have already stated; that the trust of a term, being governed by the same rules, as the limitation of the term itself at law^b, the parties cannot make it descendible, as real property, to the heir, except in the particular case, where, by analogy to the doctrine of merger

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^a 2 Col. Jur. N^o 5.^b See 1 Vern. 164.

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at law, the courts of equity consolidate the equitable interest of the term with the inheritance. The author of the *Treatise of Equity* has properly observed (2 vol. 106.), “that a term attendant becomes in *gross*, “when it is divided from the inheritance by “*different limitations*. The trusts of a term “in gross therefore can be limited no other- “wise in equity, than the estate of a term in “gross can be devised in law; for they are “not for setting a rule of property in Chan- “cery, other than that, which is the rule of “property at law.”

It is probable, therefore, from the confused statement of the case of *Scott v. Fenhouillet* in *Brown*, that lord Thurlow's words are not correctly reported; for considering them as an authority, the doctrine, subversive of former principles, would be practically important in its application. Cases may be suggested: for instance, suppose an estate, subject to a beneficial lease, is settled upon A. for life, with remainder to his first and other sons successively in tail, with remainders over, with remainder to B. in fee: and that B., having this remote reversion, purchases or acquires the prior lease, or term of years; if B., by any declaration, can make this term, or lease, attendant upon his reversionary inheritance, he may consequently

convert it in equity into real, instead of personal, assets. This is indeed an extreme case; but in principle there can be no difference, whether the inheritance is divided from the term by an intervening interest of ten days, or of any greater term, or estate. If there is any difference in the extent of the intervening estate, what is the measure of it? Where is the boundary to be fixed?

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It remains to be observed, that although a term be attendant in equity upon the inheritance, it is at law always considered as a term in gross: and therefore a person purchasing the inheritance, and taking an assignment of a satisfied term in the name of a trustee, will, by means of the term, protect himself against intervening incumbrances, of which he has no notice^c, and against the dower of the vendor's wife, notwithstanding he has notice of it^d. But in these cases, it is necessary, that the purchaser should acquire the actual assignment of the term to his trustee^e.

^c See Willoughby v. Willoughby, 1 Term Rep. 763. Goodtitle v. Jones, 7 Term Rep. 47. And though he purchased in the inheritance after he had notice of the second mortgage. Marsh v. Lee, 2 Vent. 339. But in the case of the King v. Smith, the judgment of which is reported by Mr.

Sugden, Vend. 536., a purchaser was not allowed to avail himself of the protection of a term against a debt due to the crown.

^d Wynn v. Williams, 5 Ves. 130. 134.

^e Maundrell v. Maundrell, 7 Ves. 567. 10 Ves. 246.

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Conversion of real into personal estate, and personal into real estate.

(6.) Notwithstanding the words of limitation of a trust in fee-simple, or fee-tail, correspond with the construction of limitations of a legal estate, money may, in a court of equity, be impressed with the nature of real estate, and lands of inheritance may be converted into the nature of personal estate.

In the case of *Fletcher v. Ashburner*^f, sir Thomas Sewell observed, “that nothing was “better established than this principle, that “money directed to be employed in the purchase of land, and land directed to be sold “and turned into money, are to be considered “as that species of property, into which they “are directed to be converted; and this in “whatever manner the direction is given; “whether by will, by way of contract, marriage-articles, settlement, or otherwise; and “whether the money is actually deposited, or “only covenanted to be paid, whether the “land is actually conveyed, or only agreed to “be conveyed. The owner of the fund, or “the contracting parties, may make land “money, or money land. The cases established this rule universally.”

In the case of *Walker v. Denne*^g, lord Rosslyn thought, that there was no equity between the real and personal representatives

^f 1 Bro. C. C. 497.

^g 2 Ves. jun. 170. 176.

upon the converted fund; but he thought, that the property was to be taken by the representatives in the state, in which it happened to be at the death of the party. But this doctrine is clearly erroneous. In *Wheldale v. Partridge*^b, lord Eldon said, “I am also disposed to say, notwithstanding the opinion of lord Rosslyn, in *Walker v. Denne*, and some other modern authorities, that if this instrument is to be taken to impress this fund with real qualities immediately upon the execution, in the question between the heir and executor, the money being once clearly and plainly impressed with real uses as land, and one of those uses being for the benefit of the heir, the impression will remain for his benefit; and to put an end to that impression it must be shown, either that the money was in possession of a person, who had in himself both the heirs and executors, or he must do some act to denote a change of his intention, as to the devolution of the property upon either; and it is not correct to say the court does not interpose between volunteers, if they give to the executor that money, which the instrument has given to the heir.” Several modern cases have established lord Eldon’s opinionⁱ.

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^b 3 Ves. 235. 5 Ves. *dulph v. Biddulph*, 12 Ves. 388. S. C. 160. *Kirkman v. Miles*,

ⁱ See *Thornton v. Hawley*, 10 Ves. 129. *Biddulph v. Shard*, 14 Ves. 348.

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Money agreed or directed to be laid out in land, is for all the purposes, for which it is so agreed or directed to be laid out, considered as real estate: it will descend to the heir^k; it will be real assets to pay debts^l; it will be subject to curtesy^m, and it will pass by a devise of lands or hereditamentsⁿ.

So real estate under an absolute trust or direction to sell, is for all purposes considered as personal estate^x, and therefore, where an heir at law becomes entitled by way of resulting trust to a partial interest, under, or in consequence of, a conveyance or devise in trust to sell, the interest so resulting to him will be part of his personal estate^o.

^k Edwards v. countess of Warwick, 2 P. W. 171. Lechmere v. Carlisle, 3 P. W. 211. Cross v. Addenbroke, and Fulham v. Jones, 3 P. W. 221. note C.

^l Trelawney v. Booth, 2 Atk. 307. Whitwick v. Jermin, cited in Baden v. Pembroke, 2 Vern. 58.

^m Sweetapple v. Bindon, 2 Vern. 536. Cunningham v. Moody, 1 Ves. 176.

ⁿ Lingen v. Sowray, 1 P. W. 172. Harvey v. Aston, 1 Atk. 364. Green v. Smith, ib. 572. and note. Beauclerk v. Mead, 2 Atk.

169. Guidot v. Guidot, 3 Atk. 253. Rashley v. Masters, 3 Bro. Ch. Rep. 99. Whitaker v. Whitaker, 4 Bro. Ch. Rep. 31.

^x The case of a conveyance by commissioners to the assignees of a bankrupt, in trust to sell, is not within the rule. Bromley v. Gooden, 1 Atk. 75. 80. : nor a sale under the decree of the court of a mortgaged estate belonging to an *infant*. Mondey v. Mondey, 1 Ves. and B. 223.

^o Hewit v. Wright, 1 Bro. C. C. 86. Wright v. Wright, 16 Ves. 188.

The fund, which is to be converted, will continue to have the equitable quality, which it is ultimately to possess, until the conversion takes place, or until some person, becoming absolutely entitled to the beneficial interest, elects to take it in the shape, in which it then is. It frequently becomes a question, what act shall amount to an election^a; although very slight evidence of intention will be sufficient. In *Bradish v. Gee*^p, lord Hardwicke said, that he could not admit, that a parol declaration would amount to an election. When a person entitled to the fee-simple of an estate to be purchased with trust money, and without requiring the purchase to be completed, causes the securities for the money to be changed in the name of a trustee, in trust for himself, *his executors and administrators*^q; and where a person, entitled absolutely to the money to arise by the sale of real estate, makes a lease of the estate itself, reserving rent payable to him, *his heirs and assigns*^r: these circumstances have been considered to amount to an election.

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A feme covert having an absolute power of appointment over her separate property, is in respect of such property in the situation of a

^a See *Stead v. Newdgate*, 2 Mer. 521.

^p Amb. 229.

^q *Lingen v. Sowray*, 1

P. W. 172.

^r *Crabtree v. Bramble*, 3 Atk. 680.

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feme sole, and is consequently capable of making an election. But where a feme covert is entitled to real estate to be purchased with trust money, not subject to her appointment, she cannot, by a mere act of election, alter the nature of the fund: she must either cause the money to be invested in land for the purpose of levying a fine of it, or she must appear personally in the Court of Chancery for the purpose of consenting to take the money as personal estate: the latter mode being considered in equity as equivalent to a fine^s.

Connected with this subject, it may not be improper to observe, that where an estate is conveyed or devised to trustees in trust to sell, and to lay out the monies to arise by the sale in the purchase of other lands to be settled upon A. in tail, with remainder to him in fee; A. previously to the sale of the original estate, may by levying a fine of it, acquire the absolute beneficial interest in it in fee-simple, and thereby elect to take the estates directed to be sold, in lieu of that directed to be purchased^t.

Neither an infant^u nor a trustee^w can elect to alter the nature of the fund.

^s Oldham v. Hughes, 2 Atk. 452.

^t Pearson v. Lane, 17 Ves. 101. Bullock v. Fladgate, 1 Ves. and B. 471.

^u Carr v. Elliston, 2 Bro. C. C. 56.

^w Earlom v. Saunders, Amb. 241. There can be no presumption to take as

When an estate is conveyed, or devised, to trustees in trust to sell, and to pay the monies to arise by the sale among several persons, it is necessary, that all the ~~cestuique trust~~ *cestuique trust* should concur in electing to take the original property as real estate; for none of the ~~cestuique trust~~ *cestuique trust* can against, or without, the consent of any one of them, prevent the sale of the estate. This is a point of great importance in the consideration of titles; and as there is not much to be found in the books upon it, I have thought it necessary to add the following extracts of the opinions of sir Thomas Sewell and lord Hardwicke.

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In *Fletcher v. Ashburner*^x, sir Thomas Sewell observes, that “where an estate is directed to be sold and the money divided among several persons, none has a right to say, that any part shall not be sold.”

In *Crabtree v. Bramble*^y, lord Hardwicke says, that “no election could determine the question as to those claiming under the trust, but as to those only, who claim as volunteers:” and in *Bradish v. Gee*^z, there is the following passage: “In the present case, one tenant in common had consented to a decree for sale of the whole estate, and

real estate, where there is incapacity. *Ashby v. Palmer*, 1 Mer. 296.

^x 1 Bro. C. C. 497.

^y 3 Atk. 680.

^z Amb. 229.

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“ his lordship said he was bound by it; for
“ the other parties were interested in that
“ consent, because their shares of the estates
“ would ~~not~~ sell so well separate, as if the
“ whole was sold together; and his lordship
“ said, even if he had afterwards petitioned,
“ that the land should not be sold, yet the
“ decree would not be varied, and the money
“ arising by the sale would go to his personal
“ representative.”

It should seem to follow from these principles, that if A. devises a real estate in trust to be sold, and directs, that the money, which shall arise by the sale, shall be invested in the purchase of another estate to be conveyed to B. in fee-simple; and if before the sale B. dies, having bequeathed the monies to arise by the sale to C., and having appointed D. his executor, C. cannot by electing to take the devised property as real estate, prevent a sale of it against D., who, as executor, may require the money for payment of the testator's debts.

Equitable mergers.

(7.) When a lesser and a greater estate are united in the same person without any intervening interest in another, the lesser estate is, generally speaking, merged at the common law: and the extinguishment is effected by the mere union of the estates without the aid of intention, and even against it. But in

equity the concurrence of beneficial interests, in the same person, does not alone consolidate them; and in some cases the courts of equity will relieve against the effects of a legal merger^a.

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A person, having an equitable lien upon an estate for the payment of a sum of money, and afterwards becoming entitled to the estate itself either for life, or in tail^b, is not, by the mere accession of the estate for life, or in tail, deprived of the benefit of his lien; for he has a partial interest in the estate, and an absolute right to the money: and there is no ground in equity to exonerate the estate from the lien in favour of the persons in remainder, or of the issue in tail, to the prejudice of the personal representatives of the tenant for life, or in tail.

But where a person is absolutely entitled to a sum of money charged upon an estate, and afterwards becomes entitled to the fee-simple of the estate, the Court of Chancery, in most cases, consolidates the rights by extinguishing the equitable lien. The rule however has two exceptions; the first in favour of creditors^c; and the second in favour of

^a See *Danby v. Danby*, Finch, 220. *Sanders v. Bournford*, *ibid.* 424.

Vin. 369. pl. 4.

^b *Duke of Chandos v. Talbot*, 2 P. W. 604. 15

^c See 2 Vern. 208. *Compton v. Oxenden*, 2 Ves. J. 261.

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infancy, where the person, becoming entitled to the charge and the estate, dies during his minority, having by will disposed of the charge^d.

These points are well explained by lord Northington in *Donisthorpe and Wife v. Porter*^e. In that case Richard Porter settled estates to the use of himself for life, remainder to his wife for life, remainder to trustees for 100 years for raising 1000*l.* for portions of daughters and younger sons, with remainder to himself in fee.

Richard Porter died leaving one son and a daughter. The wife of Richard Porter also died; then the daughter died intestate, leaving Richard (who was entitled to the estate in fee-simple), her only brother, and next of kin. Richard the son died intestate, leaving Robert Porter, his heir at law, and Catherine wife of Donisthorpe (the plaintiff), his next of kin.

Donisthorpe and wife filed their bill against Robert Porter to have the 1000*l.* raised; and lord Northington, chancellor, said, "The

^d *Chester v. Willis*, Amb. 246. *Powell v. Morgan*, 2 Vern. 90. *Thomas v. Keymiss*, 2 Vern. 348. See also the case, where a mortgagee

acquires the equity of redemption, *Forbes v. Mof-fat*, 13 Ves. 384. *Toulmin v. Steere*, 3 Meri. 210.

^e Amb. 600.

“ question, whether the 1000*l.* ought to be SECT. IV.
 “ raised, is a question of consequence. I do In what cases
 “ not find, that the counsel has cited a de- trusts differ
 “ cision in point ; yet on grounds of general from legal es-
 “ practice, I am perhaps better satisfied than tates.
 “ I should be, if I depended on authorities.
 “ It is a case of consequence, because it may
 “ frequently happen in families. It might, if
 “ determined for the plaintiffs, revive dor-
 “ mant claims in families. I think cases of
 “ consolidating rights in equity are reducible
 “ to a solid foundation. I do not think it a
 “ rule, that a charge upon an estate, which
 “ can only be got at by trustees, and so not
 “ merge at law, shall be distinct in equity,
 “ and go to the administrator, whilst the
 “ estate goes to the heir. But I think, where
 “ the owner has an absolute interest in the
 “ estate and charge, the charge is annihilated
 “ for the benefit of the estate and heir. The
 “ court does not consider the subtleties of
 “ mergers ; but discharges the estate from
 “ the incumbrance ; it would otherwise bur-
 “ then estates to no purpose. But there are
 “ two exceptions ; 1st, the case of creditors
 “ arising from the power and justice of this
 “ court, correcting the illiberality of law,
 “ with regard to creditors ; viz. that a man
 “ may die insolvent leaving a very good
 “ estate :—2dly, of infants^f. As to mergers,

^f In the case of lord Ves. J. 261. the chancellor Compton v. Oxenden, 2 said, the cases of infants

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“ courts of law cannot look into rights or
“ beneficial interests. It merges estates lying
“ in the same person, but cannot where they
“ lie in different persons. Equity does not
“ regard that, but looks into the beneficial
“ interests and views of the parties, whether
“ the estates are strictly in the same person,
“ or in different persons.” The bill was there-
fore dismissed.

Even in the case of infancy, it seems necessary, in order to keep the charge on foot, that the infant should manifest an intention, that the charge should not merge^a: and upon this principle, there is no equity in favour of the personal representatives of a lunatic against the heir to have a charge of this kind raised^b.

When a man marries an infant, entitled to the fee-simple of an estate, and to a sum of money charged upon it, and which becomes an interest vested in the infant upon the event of the marriage, it should seem, that the charge would not merge to the prejudice of the husband.

turn upon a *supposed intent*: and that the court saw in *Thomas v. Keymiss*, that it was much more beneficial to the *infant*, that it should continue *personal*; because the infant has the use and disposition of that before 21; but he could have no

disposable interest in real till that age. See also, 18 Ves. 392, 393.

^a See *Powell v. Morgan*, and *Thomas v. Keymiss*, *supra*; and *Chester v. Willis*, Amb. 246.

^b *Compton v. Oxenden*, *supra*.

Upon a case where two daughters were presumptively entitled to a sum of money, raisable under the trusts of a term of years, and which was to become vested in them at the age of twenty-one, or marriage, and the fee-simple descended upon them before the portions became vested, and afterwards one of the daughters married under twenty-one, and the other married, having attained that age, the late Mr. Fearneⁱ thought “that after the descent, each daughter might be considered as entitled to one moiety of the lands, and to a charge of one moiety of her portion out of the other moiety of the lands; and although as such charges were equal and reciprocal, they may be said to have countervailed and discharged each other, yet, considering that such a conclusion would be in prejudice to the rights of third persons; viz. their husbands, who would have been entitled to such portions, it was not to be relied on.”

SECT. IV.

In what cases trusts differ from legal estates.

But Mr. Fearne’s opinion, as to the charge of each daughter upon the other’s moiety, is not tenable; for in the arrangement of equitable rights, it is a principle of the Court of Chancery to avoid circuitry. In fact, the point had previously received a determina-

ⁱ Opinion dated 1784.

SECT. IV.

In what cases
trusts differ
from legal es-
tates.

tion in the case of *Stephen v. lord Bateman*^k.

SECT. V.

Trusts exe-
cuted, and
trusts execu-
tory.

V. There is a distinction between a trust executed, and a trust executory. When an estate is conveyed to the use of A. and his heirs, with a simple declaration of the trust for B. and his heirs, or the heirs of his body, the trust is perfect; and it is said to be executed, because no further act is necessary to be done by the trustee to raise and give effect to it; and, because there is no ground for the interference of a court of equity to affix a meaning to the words, declaratory of the trust, which they do not legally import.

But in the case of articles of agreement, made in contemplation of marriage, and which are consequently preparatory to a settlement, and in the case of those wills, which are merely directory of a subsequent conveyance, the trusts declared by them are said to be executory, because they require an ulterior act to raise and perfect them. They are rather considered as instructions for settlements, than as instruments in themselves

^k 1 Bro. Cha. Ca. 22. It must be observed, that if Mrs. Stephens, in this case, had a charge upon her sister's moiety, for a moiety of her (Mrs. Stephens') portion, then the settlement by Mr. and Mrs. Stephens, of her moiety of the estate, would have been no extinguishment of that moiety of her portion, which was charged upon her sister's moiety of the estate.

complete: and the Court of Chancery, in order to promote the presumed views of the parties in the one case, and to support the manifest intention of the testator in the other, will attach to the words, expressive of the trusts, a more liberal and enlarged construction, than they would admit, if applied either to the limitation of a legal estate, or a trust executed.

SECT. V.

Trusts executed, and trusts executory.

It has before been observed, that words of limitation, applicable to trusts executed, correspond with the limitations of legal estates. But in a marriage agreement, directory of a settlement, the words, “ heirs of the body,” will be considered as words of purchase, and will authorize a limitation in strict settlement to the first and other sons successively in tail; for it would be inconsistent with the nature of the transaction, and would defeat the objects of the articles, if, by construing those words as words of limitation, an estate tail were limited to the husband, which he might immediately afterwards defeat¹.

¹ See *Jones v. Langton*, 1 Eq. Ab. 392. *Nandick v. Wilks*, *ibid.* 393. *Streatfield v. Streatfield*, Ca. Temp. Talb. 176. See also *Trevor v. Trevor*, 1 P. W. 622. *Cusack v. Cusack*, 5 Bro. Par. Ca. 116. ed. 1803. The case of *Chambers v. Chambers*, 5 Vin.

513. *Fitz-Gib.* 127. is an exception to the rule. In that case, an estate to be purchased with trust money, was agreed to be settled on the husband for life, with remainder to his first and other sons successively in tail; and it was covenanted that another estate should

SECT. V.

Trusts executed and trusts executory.

In wills, raising executory trusts, words of limitation, as "heirs of the body," will be converted into words of purchase, if the testator has, by some expression, manifested an intention, that they should not be construed in the former sense : as where a testator, having, by will, directed an estate to be settled upon A. and the heirs of his body, explains the extent of the gift to A. by declaring, that he shall be tenant for life without impeachment of waste^m; or, that there shall be trustees to preserve contingent remaindersⁿ; or, that the heirs of the body shall take "in succession and priority^o;" or, "as counsel shall advise^p;" or, that the settlement upon A. shall be made "at the discretion of the trustees^q;" or, that the settlement shall be so made, that A. shall not be empowered "to dock the entail^r;" or,

besettled upon the husband and the heirs male of his body. It was determined, that the latter agreement did not authorize limitations in strict settlement; for by the former agreement, the parties appear to have understood the effect of words of purchase. It should seem, that where by articles the husband's estate is agreed to be settled upon the intended wife, "and the heirs of her body," the court will not order it to be settled otherwise: for the estate being *exprovisione viri*, it is protected from the

alienation of the tenant in tail by the statute 11 Hen. 7. See *Green v. Ekins*, 2 Atk. 473. *Honor v. Honor*, 1 P. W. 123. *Whately v. Kemp*, 2 Ves. 358.

^m *Glenorchy v. Boswell*, Ca. Temp. Talb. 3. 19.

ⁿ *Papillon v. Voice*, 2 P. W. 471. *Bagshaw v. Spencer*, 2 Atk. 570. 581.

^o *White v. Carter*, Amb. 670.

^p *Bastard v. Proby*, cited by Mr. Cox, 2 P. W. 478.

^q *Read v. Snell*, 2 Atk. 642.

^r *Leonard v. Earl of Sussex*, 2 Vern. 526.

that the settlement shall be made upon A. (being a feme covert) "for her separate use" for life^s.

SECT. V.
Trusts executed and trusts executory.

But to authorize this latitude of construction in the case of wills, the intention of the testator must appear^t; and, therefore, under a simple direction to convey an estate to A. and the heirs of his body, A. will be entitled to an estate tail^u.

The ground, therefore, of construction respecting words of limitation, differs in wills and marriage-articles: in wills, it is the intention of the testator manifestly appearing; and in articles, the nature of the transaction, and the presumed objects of the parties.

The late Mr. Fearne^w thought, that a power of selling, not expressly authorized by marriage-articles, might be introduced into a settlement made in pursuance of them, and would be supported in equity: but it has been decided in a late case of a will^x, that

^s Roberts v. Dixwell, 1 Atk. 607.

^t See Stanley v. Stanley, 16 Ves. 491.

^u See Legate v. Sewell, 1 P. W. 87. 90. Ball v. Coleman, ib. 142. 2 P. W. 474. See the Master of the Rolls' argument in Blackburn v. Stables, 2

Ves J. and Beames, 367. 370. And see Jervoise v. duke of Northumberland, 1 Jacob and W. 559.

^w Posth. Works, 309. And see Peake v. Penlington, 2 Ves. and Beames, 311.

^x Wheate v. Hall, 17 Ves. 80. Brewster v. Angel, 1 Jacob and Walk. 625.

SECT. V.

Trusts executed, and trusts executory.

the introduction of a power of selling in a settlement, was not authorized, when the will was silent as to the power.

In the execution of an executory trust the court will direct a limitation to be inserted in the settlement to preserve contingent remainders^y; and both in wills^z and marriage-articles^a, cross remainders may be raised by implication.

In the case of the duke of Newcastle v. Lincoln^b, a conveyance was made before, and in consideration of, marriage, of real estates in strict settlement, with a covenant to assign leasehold estates to trustees, “in trust
“for such person or persons, and for such,
“or the like, ends, intents, and purposes as
“are thereinbefore mentioned of and concerning the said castles, &c., as far as the
“law would in that case permit;” and lord Rosslyn thought, that the settlement should be so framed, that no person, being tenant in tail by purchase, should become entitled

^y Baskerville v. Baskerville, 2 Atk. 279. Stamford v. Hobart, 3 Bro. Par. Ca. 31 ed. 1803.

^z Green v. Stephens, 12 Ves. 419. 17 Ves. 64. Marryatt v. Townley, 1 Ves. 102. 104.

^a Twisden v. Lock, Amb. 663. Duke of Richmond v.

lord Cadogan, cited 17 Ves. 67. West v. Erissey, 2 P. W. 349. Horne v. Barton, Cooper, 257.

^b 3 Ves. 387. 12 Ves. 218. See also Gower v. Grosvenor, Barn. 54. and 2 Ves. and Beames, 63. in lord Southampton v. marquis of Hertford.

to a vested interest in the leasehold estate, SECT. V.
 until he attained twenty-one, or dying under Trusts exe-
 that age, unless he left issue inheritable to truts execu-
 the entail. tory.

VI. To prevent the inconveniences, which SECT. VI.
 arose from parol declarations, and secret trans- Of the declara-
 fers of uses, the statute 29 Car. 2. c. 3. s. 7. tion of trusts
 requires, that "all declarations or creations pursuant to
 "of trusts or confidences of any lands, te- stat. 29 Car. 2.
 "nements, or hereditaments, shall be mani- c. 3. sec. 7.
 "fested and proved by some writing signed
 "by the party, who is by law enabled to de-
 "clare such trust, or by his last will in writ-
 "ing:" and by the ninth section, "that all
 "grants and assignments of any trust or con-
 "fidence shall likewise be in writing, signed
 "by the party granting or assigning the
 "same, or by such last will or devise."

This statute, it is said, does not extend to the declaration or creation of trusts of mere personalty^c.

(1) There is no regular form prescribed by In respect to the
 the courts of equity for the declaration or form of the de-
 creation of the trust. Therefore a note, or claration.
 memorandum in writing, from a trustee, pro-
 mising to execute a declaration of trusts^d,

^c See *Nab. v. Nab*, 10 P. W. 9.

Mod. 404. *Fordyce v. Wil-* ^d *Bellamy v. Burrow*, Ca.
lis, 3 Bro. Cha. Ca. 587. 1 *Temp. Talb.* 97.

SECT. VI. or confessing, that he purchased lands with another man's money^e; or a bond from a trustee, either to perform the trusts of a conveyance, in which no trusts are mentioned^f, or to make an assignment as his cestuique trust shall direct^g; a recital in a purchase-deed, that the consideration-money belonged to a third person^h, an answer in chancery, confessing a trustⁱ; a letter from a trustee disclosing the purposes of a devise to him^k; these, and indeed any writing in the shape of mutual covenants or articles of agreement^l relative to the transfer or produce of land, although without seal or stamp^m, if they properly discover the intention of the parties, are sufficient in a court of equity, to create trusts.

In respect to the words of the declaration.

(2.) As there is no regular form for a declaration, so there is no particular set of words, nor mode of expression, prescribed by the statute, or adopted by the courts of equity, for the purpose of raising trusts. It has, therefore, been repeatedly decided, that

^e Lane, v. Dighton, Amb. 409. See Ambrose v. Ambrose, 1 P. W. 322. Ryall v. Ryall, 1 Atk. 59.

^f Goodwin v. Cutler, Finch, 356.

^g Moorcroft v. Dowding, 2 P. W. 314.

^h Kirk v. Webb, Prec. Ch. 84. Deg v. Deg, 2 P. W. 415. Ryall v. Ryall, 1

Atk. 59.

ⁱ Hampton v. Spencer, 2 Vern. 288. Cottington v. Fletcher, 2 Atk. 155.

^k Crook v. Brookeing, 2 Vern. 106.

^l Legard v. Hodges, 3 Bro. Cha. Ca. 531.

^m Hodsden, v. Lloyd, 2 Bro. Cha. Ca. 534.

any words in a will, intimating, or in the nature of a request, wish, desire, recommendation, &c., are sufficient to create a trust, if the object of the gift, and the gift itself, can be correctly ascertainedⁿ. But if the certainty of the gift and object fail, then the trust must also fail, although the intention to create it should appear evident upon the face of the will^o.

SECT. VI.

Of the declaration of trusts pursuant to stat. 29 Car. 2. c. 3. sec. 7.

(3.) When an estate is vested in trustees in fee-simple, in trust to raise a sum of money, without specifying the particular mode of raising it, the trust will authorize a sale^p;

As to the effect and construction of particular words; such as "rents and profits."

ⁿ Eales v. England, Prec. Ch. 200. 2 Vin. 466. S. C. 1 Eq. Ab. 297. pl. 3. S. C. Cloudsley v. Pelham, 1 Vern. 411. Jones v. Nabbs, 1 Eq. Ab. 404. pl. 3. Richardson v. Chapman, 1 Burn Eccl. Law, 225. Vernon v. Vernon, Amb. 3. 2 Bro. Cha. Ca. 227. S. C. cited. Clifton v. Lombe, Amb. 519. Massey v. Sherman, Amb. 520. Nowlan v. Melligan, 1 Bro. Cha. Ca. 489. Pierson v. Garnett, 2 Bro. Cha. Ca. 38. 226. Finch Prec. Ch. 200. in note, S. C. Davis v. King, 2 Bro. Cha. Ca. 600. Taylor v. George, 2 Ves. and B. 378. Forbes v. Ball, 3 Mer. 437. Parsons v. Baker, 18 Ves. 476.

^o Harding v. Glyn, 1 Atk. 469. Le Maitre v. Bannister, 2 Bro. Cha. Ca.

40. cited Finch Prec. Ch. 201. S. C. Bland v. Bland, 2 Bro. Cha. Ca. 43. cited Finch Prec. Ch. S. C. Harland v. Trigg, 1 Bro. Cha. Ca. 142. Wynne v. Hawkins, 1 Bro. Cha. Ca. 180. Sprange v. Bernard, 2 Bro. Cha. Ca. 585. Note the case of Cunliffe v. Cunliffe, Amb. 686. Finch Prec. Ch. 201. S. C. 2 Bro. Cha. Ca. 42. S. C. was overruled by the Master of the Rolls in the case of Pierson v. Garnett, 2 Bro. Cha. Ca. cited supra. See 2 Bro. Cha. Ca. 46. Hill v. Bishop of London, 1 Atk. 620.

^p Baines v. Dixon, 1 Ves. 41. Wareham v. Brown, 2 Vern. 153. Newman v. Johnson, 1 Vern. 45. See 8 Vin. 461. pl. 7, 8. notes.

SECT. VI. and as a devise of the “*rents and profits*” of an estate will, at law, carry the land itself, it has been determined, that a trust to raise money by “*rents and profits*,” will empower the trustees to sell^q, unless there are some words to restrain the sense of those words to “*annual*” profits^r.

Of the declaration of trusts pursuant to stat. 29 Car. 2. c. 3. sec. 7.

In the anonymous case 1 Vern. 104. a distinction is taken between a deed and a will, as to the operation of the words “*rents and profits*,” but there does not appear to be any ground for this distinction^s.

SECT. VII. VII. By the eighth section of the statute 29 Car. 2. c. 3., it is provided, “*that where any conveyance shall be made of any lands or tenements, by which a trust or confidence shall or may arise or result by the implication or construction of the law, or be transferred or extinguished by an act or operation of law, then and in any such case, such trust or confidence shall be of the like force and effect, as the same would have been, if this statute had not been made*”^x.

Resulting and constructive trusts.

^q Gibson v. Rogers, Amb. 93. 8 Vin. 461. pl. 7, 8, 9, 10, 11. Lingen v. Foley, 2 Cha. Ca. 205. Allan v. Backhouse, 2 Ves. and B. 65.

^r Ivy v. Gilbert, 2 P. W. 13. Evelyn v. Evelyn, 2 P. W. 666. Mills v. Banks,

3 P. W. 8. Anon. Vern. 104. Green v. Belcher, 1 Atk. 506.

^s See Trafford v. Ashton, 1 P. W. 418.

^x The 7 Wm. 3. c. 12. s. 7, 9, 10, 11. in Ireland is similar to 29 Car. 2. c. 3.

In the case of *Lamplugh v. Lamplugh*^t, it was said, that this section must relate to trusts and equitable interests, and cannot relate to a use, which is a legal estate: and it is observable, that parol evidence may be admitted to rebut a resulting trust^u.

SECT. VII.

Resulting and constructive trusts.

The following are instances of trusts, arising from the operation or construction of equity.

(1.) When an estate is subject to a trust or equitable interest, and a person purchases it for a valuable consideration with notice of the trust or equitable interest, the estate will be subject to it in the hands of the purchaser^w; and a person acquiring an estate as a mere voluntary grantee, even without notice^x, or as a devisee^y, will take it subject to every beneficial or equitable lien. The principle has been extended to that equitable

Constructive trust arising from notice.

^t 1 P. W. 112.

Atk. 383.

^u 2 Vern. 294. 1 P. W. 112.

^w *Saunders v. Dehew*, 2 Vern. 271. *Langton v. Astrey*, 2 Cha. Rep. 30. 3 Atk. 238. *Daniels v. Davison*, 16 Ves. 249. "Though he had no notice before he paid his money, yet he had notice before the execution of the conveyance, and it is all but one transaction." Per lord Hardwicke in *Wigg v. Wigg*, 1

Under this head may be classed those cases, where leases have been made at an under value by trustees to charitable uses. See *Attorney-general v. Magwood*, 18 Ves. 315., and the cases there referred to, and *Attorney-general v. Brooke*, *ibid.* 319.

^x See 1 Co. 121. b. *Pye v. George*, 2 Salk. 680.^y *Marlow v. Smith*, 2 P. W. 200.

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Resulting and
constructive
trusts.

lien, which a vendor has for any part of his purchase-money remaining unpaid^z.

In the application of the above rule, it has been determined, that notice of a bargain and sale not inrolled^a, of a deed not registered^b, and of a judgment not docketed^c, will affect the purchaser: the Court of Chancery thereby giving an equitable validity to an instrument, which, the legislature has expressly declared, shall have no legal operation against a purchaser.

But a person purchasing with notice of a voluntary conveyance under the statute 27 Eliz. c. 4. will not be bound by it^d; for the statute makes the voluntary conveyance constructively fraudulent; and the purchaser, buying with notice of a fraud, is not by the means of that notice converted into a trustee.

If a person purchases of a trustee for a valuable consideration without notice, he will hold discharged of the trust; but if the original trustee repurchases the estate, he will be again converted into a trustee, notwith-

^z *Mackreth v. Symmons*, 3 Atk. 646.
15 Ves. 329. *Grant v. Mills*, 2 Ves. and B. 306.

^a 3 Atk. 651, 652.

^b *Le Neve v. Le Neve*,

^c *Davis v. earl of Strathmore*, 16 Ves. 419.

^d See *Doe ex dem. Otley v. Manning*, 9 East, 59.

standing the first purchaser had levied a fine, and five years non-claim had run upon it^e. But a stranger, who purchases with notice from a person, who purchased for a valuable consideration without notice, may, it is conceived, shelter himself under the first purchase^f.

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constructive
trusts.

It is not clear, how far a purchaser may be affected by notice of a constructive or doubtful trust. It is to be lamented, that he is subject to it in any case. Where a settlement was made in pursuance of articles, and pursuing the exact words of the articles, gave an estate tail to the husband, instead of limiting the estate to him for life, with remainder to his first and other sons in strict settlement, it was determined, that a purchaser with notice of the articles (which were of long standing), would not be affected by reason of the notice, with a trust for the benefit of the issue^g; and in the case of

^e Bovey v. Smith, 1 Vern. 60. 2 Ch. Ca. 124. S. C.

^f See Lowther v. Carlton, 2 Atk. 242. and the cases in the note to the last ed.: and see 11 Ves. 478. in *McQueen v. Farquhar*.

^g See *Warwick v. Warwick*, 3 Atk. 293. *Senhouse v. Earle*, Amb. 285. The case of *Powel v. Price*, 2 P. W. 533. seems to have been determined upon the same principle. In the

case of *Parker v. Brooke*, 9 Ves. 583. the Master of the Rolls, alluding to the case of *Senhouse v. Earle*, said, that "Lord Hardwicke took it to be clear, that if the articles had been modern, he must have reformed them even against a purchaser." It is observable, that in *West v. Erissey*, 2 P. W. 349. the plaintiff did not attempt to impeach the purchasers.

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trusts.

Cordwell v. Mackaril^h, the Chancellor says,
“ I am unwilling to think, that the sub-
“ jects are bound to take notice of the rules
“ of equity, as they are of a court of law.
“ They must take notice of a deed, on which
“ an equity arises, supported by precedents,
“ the justice of which every body must ac-
“ knowledge, as prior incumbrances, but not
“ the mere construction of words, which are
“ uncertain in themselves, and often depend
“ on the locality of themⁱ. ”

Of resulting
trusts.

Where an es-
tate is purchas-
ed in the name
of one, and the
consideration-
money paid by
another person.

(2.) If an estate be purchased in the name
of one person, and the consideration-money
belong to, or be paid by, another, the estate
so purchased, will be subject to a trust in fa-
vour of the person claiming, or paying, the
money; although there be no express decla-
ration for that purpose^k.

In order to raise a trust of this kind, the
fact of the ownership of the money should
appear upon the face of the deed, either by

^h Amb. 515.

ⁱ See *Hardy v. Reeves*,
5 Ves. 426.

^k *Lloyd v. Spillett*, 2 Atk.
150. 257. 1 Atk. 60. 1
Vern. 366. 4 Bro. P. C.
67. *Wray v. Steele*, 2
Ves. and B. 388. which was
the case of a joint advance.
But according to the policy
of the registry acts (26
Geo. 3, c. 60. 34 Geo. 3,

c. 68.), the registry of a
ship is conclusive evidence
of the equitable, as well as
legal, property. *Ex parte*
Houghton, 17 Ves. 251.
“ There can be no such
“ thing as the equitable
“ ownership of a ship.”
Dixon v. Ewart, 3 Mer.
333. See *Ryle v. Haggie*,
1 Walker and Jac. 234.

a recital, or by expressions, which amount to a necessary implication, or presumptive proof of it¹. If, however, it be expressly stated in the conveyance, that the money was paid by the nominal purchaser, and nothing shall appear to explain the nature of the transaction, then, if in his lifetime, such nominal purchaser shall, by any note or memorandum in writing^m, or by his answer to a bill filed against him, for a recovery thereof (though he shall at the same time plead the statute of fraudsⁿ), confess the purpose, for which the purchase was made; or if, after his death, he shall leave any papers disclosing the real circumstances of the case^o; in all these instances the court will raise the trust, even against the express declaration of the purchase-deed. If, indeed, upon a bill filed against him for a discovery, the nominal purchaser deny the facts by his answer, and insist upon the statute of frauds, it should seem that parol proof cannot be admitted to prove the trust^p; and it is conceived, that after the death of the supposed nominal purchaser,

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¹ See 2 Vern. 168. Prec. Ch. 104. *Kirk v. Webb*, ib. 84. *Denton v. Davis*, 18 Ves. 499.

^m See ante, 315. and *O'Hara v. O'Neil*, 2 Eq. Ab. 745. and *Vin. tit. Trust (E.)*

ⁿ *Cottington v. Fletcher*, 2 Atk. 155. But see *Edwards v. Moore*, 4 Ves. 23.

^o *Ryall v. Ryall*, Amb. 413. *Lane v. Dighton*, ib. 409.

^p See *Skett v. Whitmore*, 2 Freem. 352. *Newton v. Preston*, Prec. Ch. 103. *Willis v. Willis*, 2 Atk. 71. *Cooth v. Jackson*, 4 Ves. 12. *Rowe v. Teed*, 15 Ves. 374. See *Evans v. Harris*, 2 Ves. and B. 361.

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trusts.

parol proof alone, can in no instance be admitted against the express declaration of the deed^a. The cases of *Ryall v. Ryall*^r, and *Lane v. Dighton*^s, are by no means authorities against this construction; for, as to the former, it will be found, upon examining Mr. Ambler's report of it^t, that the inquiry was directed only as to 250*l.* which appeared by papers of the testator, to have been trust-money: and as to the latter, there was evidence in the case under Mr. Dighton's handwriting, that the trust stocks had been sold, and the money laid out from time to time in the purchase of land. In *Liebman v. Harcourt*, 2 Mer. 513. the money was followed by the evidence of the banker's books, and of the clerks in the house. But that was the case of stock.

The preceding observations have been adopted by one intelligent writer^u, and they have been controverted by another^w, upon the ground, "that the statute of frauds is not "more broken in upon by admitting parol "proof after the death of the nominal purchaser, than by allowing such proof in his "lifetime." The question, however, will still

^a *Kirk v. Webb*, Prec. P. W. 414.

Ch. 34. 2 Freem. 229. S.

C. *Heron v. Heron*, Prec.

Ch. 163. *Halcot v. Mark-*

ant, *ib.* 168. *Kinder v.*

Miller, *ib.* 172. 2 Vern.

440. S. C. *Deg v. Deg* 2.

^r 1 Atk. 59.

^s Amb. 409.

^t Amb. 413. S. C. cited.

^u *Roberts on Frauds*, 99.

^w *Sugden on Vend.* 415,

416.

be, whether the parol evidence of third persons can be admitted during the purchaser's life against his own express declaration. When upon the face of the instrument, or by other written evidence, it appears, that the consideration paid by the grantee is the property of another person, there is an equitable presumption, that the estate is purchased for the benefit of the person, with whose money it was bought; and this resulting trust so created by a construction of equity, may be rebutted by parol evidence; for the trust itself, not being within the statute of frauds, may be repelled or varied without the aid of it^x. But it is difficult to discover a principle, upon which parol evidence alone can, consistently with the statute, be admitted to establish a fact, the effect of which, if established, is to create an equitable interest, and not to counteract a constructive trust previously raised^y.

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trusts.

The rule, which I have explained, is not applicable to the case of a purchase made by

^x See *Lamplugh v. Lamplugh*, 1 P. W. 113. *Taylor v. Alston*, cited in *Dyer v. Dyer*, Watk. 223.

^y If the case of *Lench v. Lench*, 10 Ves. 511. is to be considered as an unqualified decision, establishing the admission of parol evidence alone, I must in course bow to the authority. After a devise of real es-

tates, the testator cannot create a trust upon the devise, by writing not attested by three witnesses. *Can v. Addington*, 3 Atk. 141. But it seems, that in a bill for discovery of a secret trust, the devisee will be bound to answer as to the fact. *Muckleston v. Brown*, 6 Ves. 52.

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trusts.

The exceptions
to the rule.

Purchase by a
father.

a father in the name of a son, unprovided for at the time of such purchase: for in that case the purchase shall be considered as an advancement for the son, and not as a trust for the father; although the father takes the possession, and receives the rents and profits². It is the same, where the grandfather purchases lands in the name of a grandchild, the father being dead; for then the grandfather is *in loco parentis*³.

In these cases, the father cannot by a subsequent deed, declare his son to be a trustee^b; nor can the son himself, on his sick bed, make a declaration of trust in favour of his father, so as to prevent his own wife from dower^c.

² Gray v. Gray, 1 Eq. Ab. 381. 2 Swanst. 594. Taylor v. Taylor, 1 Atk. 386. 1 P. W. 111. 608. 2 Atk. 480. In Gilbert's Lex Prætoria (271.) it is said, "but if the father purchases in the name of his son, who is of full age, which, by our law, is an emancipation out of the power of the father, there if the father takes the profits, or lets leases, or acts as the owner of the estate, the son is a trustee for the father; because there is the same resulting trust, as if the son were a stranger, where the father acts as owner of the estate, since it was purchased with his money," See Treatise of Eq. 2 vol. 122.

³ Ebrand v. Dancer, 1 Eq. Ab. 382. So if a person purchase in the name of his wife, the wife is not a trustee for her husband. Kingdom v Bridges, 2 Vern. 67. Back v. Andrews, Prec. Cha. 1. 2 Vern. 120. So where a father purchases a copyhold estate, held for lives, and takes the grant in the names of himself and his son in succession. The cases upon this head will be found in Dyer v. Dyer, Watk. 216. Finch v. Finch, 15 Ves. 43.

^b 2 Cha. Ca. 231. The evidence of intention must be contemporaneous. Murrell v. Franklin, 1 Swanst. 13.

^c Bateman v. Bateman, 2 Vern. 406.

So if a father buy in the names of his son and a trustee^d, or in the names of himself and son^e, in either case it is an advancement. But in these instances, the father shall have the benefit of survivorship in case the son die during his minority: although the son shall not have the benefit of survivorship, as against the judgment creditor of the father^f.

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It seems, that when the son is provided for at the time of the purchase, he stands in the situation of a stranger^g. Where a grandmother, during the life of the father, invested 100*l.* in the purchase of an exchequer annuity in the name of a grandchild; the child's father gave a bond to the grandmother for the repayment of 100*l.* if the child died before the grandmother; the grandmother received the income, and kept the tally, the grandchild making no claim; it was held to be a trust for the grandmother^h.

(3.) When a voluntary conveyance is made with a declaration of trusts, as to a part only of the land, or of the estate or interest in it, there is a resulting trust, in that case, for the

Where the express declaration of the trust extends to a part of the land or interest.

^d *Lamplugh v. Lamplugh*, 2 Atk. 477.
1 P. W. 111.

^e *Scroope v. Scroope*, 1 Ca. 232.
Cha. Ca. 27.

^f *Back v. Andrews*, 2 Vern. 120.
^g *Lloyd v. Read*, 1 P. W. 607.

^h *Stileman v. Ashdown*,

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grantor or his representatives, as to the part, or interest, of which there is no declarationⁱ; as where A. granted an advowson to B. for 99 years in trust to present a particular person, the beneficial interest in the term beyond the purpose, for which the grant was made, vested in the grantor^k.

The rule is applicable to devises. Where a testator creates an executory trust, or devise, to take effect within the limit allowed by law, and makes no disposition of the intermediate beneficial interest, the trust or equitable estate will descend to the heir, until the contingency happens, upon which the equitable executory devise is to arise: or, where the legal estate in fee-simple is devised to trustees, in trust for A. for life, with remainder to his first and other sons successively in tail, with remainder to the first and other sons of B. successively in tail, and A. dies without having had a son in the lifetime of B., who has no son then living; the legal estate of the trustees will support the contingent remainder to the sons of B.; and until the birth of B.'s son, or until such event becomes impossible by the death of B., the

Barn. Cha. Rep. 308.
2 Atk. 150.

^k *Cottington v. Fletcher*,
2 Atk. 156.

beneficial interest will descend to the testator's heir¹.

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In the case of *Sherrard v. lord Harbrough*, Amb. 165., Bennet earl of Harbrough by his will devised all his manors, advowsons, &c. to trustees, in trust out of the rents and profits to pay to the succeeding earl an annuity of 1000*l.* for his life, and directed, that the surplus of the rents and profits should during the life of the earl (the annuitant) be laid out in the purchase of lands, to be settled to such uses, as the testator's other lands stood settled after the death of the said earl; and after the decease of the earl, the annuitant, the trustees were to stand seised of the estates to the use of the first and every other son of the same earl successively in tail; with remainders over. The question was, who was entitled to the right of presentation to the advowsons during the life of the earl, the annuitant. The lord chancellor determined, that the trustees themselves had no pretence of right; and that the right of presentation not having been disposed of during the life of the earl, the devisee of the annuity, it resulted to the heir.

¹ *Hopkins v. Hopkins*, 1 Atk. 581. Ca. Temp. Talb. 44. Bull. Co. Litt. 271. b. *S. C. Stanley v. Stanley*, 16 Ves. 491. See *Chambers v. Brailsford*, 18 Ves. 368. 2 Mer. 25.

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So in the case of the marquis Townshend v. the bishop of Norwich and others (Aug. 1821), it appeared, that the late lord Townshend, by his will dated the 19th of July 1811, devised unto the use of trustees and their heirs, all his real estates not previously by his will disposed of, in trust, by mortgage or sale to raise so much money in aid of his personal estate, as would be sufficient to pay his debts and legacies, and after payment thereof, in trust to convey his real estates, or so much thereof as should not be disposed of under the trust aforesaid, to the use of the same trustees and their heirs during the life of lord Charles Townshend, in trust, out of the rents and profits, to pay all taxes and other outgoings, and the expense of repairs; and then to pay an annual sum of 4000*l.* to lord Charles Townshend, and from time to time during the term of 21 years, if lord Charles should so long live, to accumulate the surplus of the said rents and profits, with remainders over after the death of lord Charles, who was not the heir of the testator. The advowson of the rectory of Rainham was included in the residuary devise contained in the will; and the rectory having become vacant, the question then arose as to the right of presentation, such right having been claimed, first, by the present marquis, as heir of the testator; secondly, by lord Charles Townshend; and thirdly, by the

trustees. The lord chancellor decided in favour of the present marquis, upon the ground, that there was a resulting trust to him, as heir at law.

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Within this rule may be included that class of cases, where a trust is created by deed or will for a particular purpose, and there is no further declaration of the trust^m; as where lands are devised to executors for payment of debts and legacies, and no further trust is declared, the executors, after the payment of debts and legacies, will be trustees, as to the surplus for the heir at lawⁿ, although the executors have no legacy, and the heir has an express one^o. So where A. devised lands to trustees to sell, and to dispose of the money as he should appoint, and provided he left no paper of appointment, to his four nephews; A. appointed several sums to be paid to several persons, which sums did not amount to the value of the lands; and it was determined, that the surplus resulted to the heir^p.

^m See *Cooke v. Guavas*, cited 2 Vern. 645. and the cases cited in the note to *Hill v. bishop of London*, 1 Atk. 619. last ed. In *Davidson v. Foley*, 2 Bro. C. C. 203. the trust of a term of years, created for particular purposes, resulted for the benefit of the tenant for life, in remainder expectant upon the term.

See the case of *Sidney v. Miller, Cooper*, 206. where a term of years was created, and no trusts of it declared, and it was directed to attend the inheritance.

ⁿ *Countess of Bristol v. Hungerford*, 2 Vern. 645.

^o *Starkey v. Brookes*, 1 P. W. 390.

^p *City of London v. Garway*, 2 Vern. 571.

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So where a rent-charge was devised to be sold to pay legacies to the amount of 800*l.*; but if the rent-charge sold for 1000*l.*, then an additional legacy of 100*l.* was given to B., and another of 100*l.* was given to C.: it was held, in this case, that if the rent-charge sold for above 800*l.* and less than 1000*l.*, the residue above 800*l.* would result to the heir at law^a. Upon the same principle, the case of *Digby v. Legard* was determined^r. E. B. devised her real and personal estates to trustees, in trust, to sell and pay debts, and to pay the residue to five persons, to be equally divided among them, share and share alike (which words in a will, create a tenancy in common); one of the residuary legatees died in the lifetime of the testatrix; and the court decided, that this was a resulting trust (as to the share in the real estate of the residuary legatee, who died in the testator's lifetime), for the benefit of the heir at law.

The general rule, which I have mentioned, that when lands are devised for a particular purpose; viz. to be sold for payment of debts, &c. there is a resulting trust for the heir at law, admits, however, of several exceptions.^s

^a *Stonehouse v. Evelyn*, 3 P. W. 251.

^r Note 1. 3 Cox's P. W. 22.

^s See note to 1 Atk. 619. 3 ed. In *Hill v. Bishop of*

London, 1 Atk. 620. lord Hardwicke observes, that "no general rule is to be laid down, unless where a real estate is devised to be sold for payment of

In *Hill v. Bishop of London*¹, lord Hardwicke observed, that if J. S. devised lands to A. to sell them to B., for the particular advantage of B.; that advantage was the only purpose to be served according to the intent of the testator; and to be satisfied by the mere act of selling, let the money go where it would; and that there was no precedent or a resulting trust in such a case: and that if A. devised lands to J. S. to sell for the best price to B., or to lease for three years, at such a fine, there could be no resulting trust to the heir of the testator. In a case² where there was a devise, by a codicil. to trustees to sell, and to dispose of the money arising by the sale to such uses and for such purposes, as

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“debts, and no more is said.
“Then certainly it is a re-
“sulting trust; but if a par-
“ticular reason occurs, why
“the testator should intend
“a beneficial interest to the
“devisee, there are no pre-
“cedents to warrant the
“court to say, it shall
“not be a beneficial inter-
“est.”

In *King v. Dennison*, 1 Ves. and B. 260. 276. lord Eldon observes, “there is
“a great difference here be-
“tween a devise *upon trust*,
“and a devise *subject to a*
“*charge*.” See *Southouse v. Bate*, 2 Ves. and B. 396.

Yet the word *trust* does not seem to be conclusive in converting the devisee into a trustee. See *Coning-*

ham v. Mellish, Prec. Cha. 31. *Dawson v. Clarke*, 15 Ves. 409.

In *Gibbs v. Rumsay*, 2 Ves. and B. 291. there was a bequest of the residue of monies arising from the sale of real estate, and the residue of personal estate, “unto
“my said trustees and ex-
“ecutors, (the said H. R.
“and J. R.)” to be disposed of unto such person or persons, and in such manner, &c. as they in their discretion should think proper and expedient; and it was held, that they had an absolute interest and not a trust.

¹ 1 Atk. 618.

² *Cook v. Duckenfield*, 2 Atk. 562.

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the testator should appoint, and in default of appointment, as they (the trustees) or the major part of them, should think proper; the testator having previously devised these lands to the same trustees for such charitable uses as he should direct by codicil or otherwise; the testator made no appointment: the trustees insisted upon the beneficial interest in the lands devised; and the heir at law claimed a resulting trust; but it was determined, that there should be no resulting trust for the heir; nor could the trustees have any beneficial interest; for that it clearly appeared, that the testator intended them no benefit, but only an authority^w.

It has been before stated, that if there be no consideration expressed in a common law conveyance, and no declaration of the use, the use will result to the grantor. But it is here necessary to observe, that the mere want of a valuable consideration will not alone create a resulting trust in favour of the grantor, or his representatives. Lord Hardwicke, in the case of *Lloyd v. Spillet*, expressly

^w To the cases, which I have cited as an exemplification of the rule, and its exceptions, I may add the more recent cases of *Attorney-general v. Wansey*, 15 Ves. 231. *Dawson v. Clarke*, 15 Ves. 409. *Wright v. Wright*, 16 Ves.

188. *Nash v. Smith*, 17 Ves. 29. *Sheddon v. Goodrich*, 8 Ves. 481. *Williams v. Coade*, 10 Ves. 500. *Hill v. Cock*, 1 Ves. and B. 173. *Maugham v. Mason*, *ibid.* 410. *Hooper v. Goodwin*, 18 Ves. 156.

made his decision upon this distinction between a use and a trust arising by operation of law^x. In fact, if the mere want of a consideration would create a resulting trust, there could be no such thing as a voluntary conveyance, so as to vest a beneficial interest in the grantee. Circumstances of fraud, mistake, or the like^y, may convert a grantee under a voluntary conveyance, into a trustee: but not the mere want of a valuable consideration.

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(4.) When a trustee or guardian renews a lease, the new lease shall be subject to the trust affecting the old lease^z; and if a lease be settled upon A. for life, with remainders over, and A. obtain a renewal of the lease, the renewed lease shall be bound by the trusts of the will or settlement^a. So if one of three lessees, under a lease from a dean and chapter, surrender the old lease, and take a new lease to himself, it shall be a trust for all of

Renewal of a lease by a trustee, guardian, or tenant for life.

^x Barn. Ch. Rep. 387, 388. 2 Atk. 150.

^y See 1 Freem. 305. 308. 2 Atk. 150. Duke of Norfolk v. Browne, Prec. Cha. 80.

^z Holt v. Holt, 1 Cha. Ca. 191. Pierson v. Shore, 1 Atk. 480. Abney v. Miller, 2 Atk. 597. Edwards v. Lewis, 3 Atk. 538. Featherstonhaugh v. Fenwick, 17 Ves. 228. Brookman v.

Hales, 2 Ves. and B. 45. Milner v. Harewood, 18 Ves. 259. 274.

^a Taster v. Marriott, Amb. 668. Raw v. Chichester, *ibid.* 715. Owen v. Williams, *ibid.* 734. Pickering v. Vowles, 1 Bro. 197. Coppin v. Fernyhough, 2 Bro. 291. Killick v. Flexney, 4 Bro. 161. James v. Dean, 11 Ves. 383. 15 Ves. 236.

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them^b. In these cases, the rule of equity is enforced even against the express intention and contract of the lessor^c.

It is observable, that the rule has been adopted in the legislature in several statutes relating to the redemption and purchase of land tax.^d

^b *Palmer v. Young*, 1 Vern. 276. In this case it should seem, that the surrender of one joint tenant was considered as binding against the others. But this is at least doubtful. In *Reed v. Tucker*, Cro. Eliz. 302. it is said, "that every act by one joint tenant for the benefit of his companion, shall bind; but those acts which prejudice his companion in estate shall not bind; as the surrender of the one."

^c *Keech v. Sandford*, Sel. Ca. Cha. 61. Whether the principle is extended in equity to the purchase of the reversion in fee expectant on the lease, see *Randall v. Russell*, 3. Mer. 190. *Hardman v. Johnson*, *ibid*. 347. *Norris v. Le Neve*, 3 Atk. 26.

^d See 39 G. 3. c. 108. sec. 8. 42 G. 3. c. 116. By the 85th section of the latter, it is enacted, "that where the reversion of any manors, messuages, lands, tenements, or other hereditaments holden under any body politic or corporate, or company, or any feoffees

or trustees for charitable or other public purposes, by virtue of any lease for one or more life or lives, or for years absolute or determinable on the dropping of one or more life or lives, or by copy of court-roll or customary tenure for life or lives, shall be purchased under the powers of this act, by or with the proper monies of the person or persons for the time being, beneficially entitled to the rents and profits thereof, and where such lease or leases shall be subject to any will or settlement, so that such person or persons shall not, at the time of purchasing the reversion thereof, be entitled to the absolute interest under such lease or leases, and such person or persons shall be bound by any covenant, engagement, or condition, to renew the lease at the accustomed periods, with his, her, or their own monies, or with or out of the rents and profits of the estate, then, and in every such case the immediate estates and interests under such subsist-

But if there be a guardian or trustee for SECT. VII.
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ing lease or leases, as well as the reversion expectant thereon, shall, under the direction of the said last-mentioned commissioners, be charged with and made subject to the repayment of the principal money advanced for the purchase of such reversion, with lawful interest, to or for the benefit of the person or persons advancing the same, his, her, or their executors, administrators, or assigns: but if the person or persons so, for the time being, beneficially entitled to the rents and profits of the estates comprised in such subsisting lease or leases as aforesaid, shall not be liable to any covenant, engagement, or condition, to renew the lease at the accustomed periods, with his or her own monies, or with or out of the rents and profits of the estate, then, and in such case, the reversion only expectant on the subsisting lease or leases, shall, under such direction as aforesaid, be charged and made subject for the benefit of such person or persons, with the payment of the principal money advanced for the purchase thereof, together with lawful interest, to accumulate from the time of such purchase, till the expiration of the subsisting lease, after deducting out of such interest the annual rent (if any) which shall

be payable during the lease, and which shall have been purchased with the reversion, unless the person or persons advancing such money shall be desirous that the same, together with the interest, may be made a charge on the subsisting lease or leases; in which case the immediate estates and interests under the same, as well as the reversion expectant thereon, shall be charged and made subject to the payment of such principal money and interest, in like manner as if such person or persons had been bound to renew the lease; and subject to such charges, so to be made respectively as aforesaid, the fee-simple of such manors, messuages, lands, tenements, or other hereditaments, shall be settled, under the like direction, for the benefit of the person or persons so purchasing the same, and of such other persons as would have been entitled under such will or settlement to the benefit of any renewed lease or leases for the time being, and so as to be enjoyed by them for such respective estates and interests, as, considering the alteration of the tenure, shall appear to the said commissioners most correspondent with the intention of such will or settlement: provided always, that where the immediate

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devised, but the title is really in a third person, and the trustee or guardian buy in the title of the third person; this shall not be taken to be a trust for the infant; for such trustee or guardian is at liberty to purchase it as well as any other person^c: and in *O'Herlihy v. Hodges*^d, lord Redesdale has observed, "that the rule is established, in order to keep trustees in the line of their duty, but not for the purpose of being an injury to a third person, if the principal injury be to him."

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VIII. I shall now explain the system of trusts, as it more immediately refers to the person and acts of cestuique trust.

estates or interests, under any such lease or leases, shall be charged with and made subject to the payment of the principal money advanced for the purchase of the reversion, the persons successively entitled to the rents and profits of the manors, messuages, lauds, tenements, and hereditaments, comprised in the subsisting lease or leases respectively, shall be made chargeable with the interest accruing during his or her estate therein; and that no greater arrear than for one year shall be recoverable against any person who shall become entitled in remainder

for interest accrued during the estate or term of any person or persons entitled to any preceding estate or interest in the premises: provided also, that it shall be lawful for the said commissioners to direct an application to be made to the Court of Chancery in a summary way, for obtaining direction as to the mode of settling any such reversion, or the equity of redemption thereof, where the case shall appear to them to be attended with difficulty."

^c *Lesley's case*, 2 Freem. 52.

^d 1 Schoales and Lefroy, 123.

(1.) Any person, who is capable of taking the legal estate directly and immediately to himself, may acquire the equitable or beneficial interest in the same estate^e.

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But it is proper to observe in this place, that in case of a trust created for a mere volunteer, not grounded on a meritorious consideration, it is necessary to vest the legal estate in a trustee; for the Court of Chancery will not compel the performance of a contract or agreement in favour of a mere volunteer^f. In *Ellison v. Ellison*, 6. Ves. 656. 662. lord Eldon says, “I take the distinction to be, that if you want the assistance of the court to constitute you *cestuique trust*, and the instrument is voluntary, you shall not have that assistance for the purpose of constituting you *cestuique trust*; as upon a covenant to transfer stock, &c. if it rests in covenant, and is purely voluntarily covenant; but if the party has completely transferred stock, &c., though it is voluntary, yet the legal conveyance being effectually made, the equitable interest will be enforced by this court^g.”

^e See before 91. Note, the king may be cestuique trust, *Middleton v. Spicer*, 1 Bro. C. C. 201.; but an alien cannot, 3 Cha. Rep. 35. I apprehend, that a corporation cannot take as cestuique trust without a

licence in mortmain.

^f See *Coleman v. Sarrell*, 1 Ves. J. 50.

^g See *Randall v. Randall*, 2 P. W. 264. *Fursacre v. Robinson*, cited 2 P. W. 468. See also 2 P. W. 176. and 248.

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It may be a question, what degree of relationship is necessary to constitute a foundation for raising a meritorious consideration sufficient to support a voluntary equitable transfer of the above description? Whether it is to be confined, as in the case of supplying surrenders of copyhold property, to the moral obligation of providing for a wife, or child, or whether it is to be extended, as in the case of a covenant to stand seised to uses, to the consideration of blood generally, has not been ascertained by any judicial decision that I am aware of. In *Edwards v. countess of Warwick*, 2 P. W. 176. lord Macclesfield says, “I take it to be clear, “that if I voluntarily, and without any consideration, covenant to lay out money in “the purchase of land to be settled on me “and my heirs, this court will compel the “execution of such contract, though merely “voluntary; for in all cases where it is a “measuring cast between an *executor* and “*an heir*, the latter *shall in equity have the “preference.*”

Actions and suits by trustees.

(2.) Cestuique trust may bring his bill in Chancery against his trustee for breach of trust or to account^f; but he has no remedy against him at law^g. Neither can cestuique

^f See *Digby v. Cornwallis*, 3 Cha. Rep. 72. *Pollard v. Downes*, 2 Cha. Ca. 121. ^g *Sturt v. Mellish*, 2 Atk. 612. *Contra*, 1 Eq. Ab. 384. (D.) note (a.) In

trust recover upon his equitable title in the courts of law as against a third person^b: but it is necessary, in order to support or obtain his rights, that he should sue in the name of his trusteesⁱ. Yet it is said, that a tender to cestuique trust of money due upon bond, and a refusal, is a good plea to an action of debt upon the bond by his trustee^k.

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(3.) By the statute 7 Will. c. 25. s. 7. it is enacted, that no person shall be allowed to have any vote in election of members to serve in parliament, for or by reason of any trust estate or mortgage, unless such trustee or mortgagee be in actual possession, or receipt of the rents and profits of the same estate; but that the mortgagor, or cestuique trust in possession, shall and may vote for the same, notwithstanding such mortgage or trust.

Cestuique trust in possession may vote at an election.

(4.) In the case of *Packer and Wyndham*^l, it is said, that every disposition of cestuique trust is binding upon the trustee in a court of

Conveyances by cestuique trust.

Burkett v. Randall, 3 Mer. 466. an issue was directed, “whether the testator J. S. was, at his death, *beneficially* entitled to the premises in question.”

^h *Doe v. Staples*, 2 Term Rep. 684. *Barnes v. Crow*, 4 Bro. C. C. 2. Whether courts of law will, upon an action for a deposit, as between vendor and purchaser, enter into equitable

objections to a title, see *Sugd. Vendors*, 212. &c. 5th ed.

ⁱ *Ex parte Coysegame*, 1 Atk. 192.

^k *Lynch v. Clemence*, Lutw. 179. ed. 1718. See the cases collected in note to pl. 2. 18 Vin. 303. as to the effect of a release by cestuique trust claiming under a bond or covenant.

^l *Prec. Cha.* 415.

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equity; and even at law. But although the conveyance of cestuique trust is conclusive upon the trustee to the extent of the beneficial interest conveyed, yet a trust is not alienable by the rules of the common law, and I have, in a preceding part of this work, attempted to show, that cestuique trust cannot convey the legal estate by virtue of the statute 1 Rich. 3.

Conveyance by cestuique trust in fee-simple.

(4. a.) In the transfer of equitable rights, it is usual in practice to adopt the species of conveyance applicable to the assurance of the legal estate; as if a person be seized of the equitable estate in fee-simple, he usually conveys it by lease and release, or bargain and sale inrolled. But this is never absolutely necessary; and in case an equitable interest is sold, it is clear, that the mere payment of the purchase-money would operate as a transfer of it.

Conveyances by cestuique trust in fee-tail, or being married women.

(4. b.) But when the owner of an equitable interest cannot, if such equitable interest were converted into a legal estate, convey it without the aid of a fine or recovery, it will be necessary for him to use the same kind of assurance by matter of record in the transfer of his beneficial interest, as if it had been a legal estate; and therefore the equitable rights of tenants in tail and married women must be conveyed by fine or recovery.

As to tenants in tail, it has been said, that SECT. VIII.
 if the trustee, having the legal estate, joins Of trusts, as more immediately referring to the person and acts of cestuique trust.
 with his cestuique trust, in making a feoffment with livery, it will destroy the equitable entail^m. But this case cannot be relied upon. If the equitable tenant in tail has the Tenants in tail.
 immediate reversion in fee, he may acquire the equitable fee-simple by a fine; but if there are equitable remainders expectant upon his estate tail, it will be necessary for him to suffer a recoveryⁿ. But where there is an equitable estate tail, attached to, or arising from, a legal estate of the same extent, with *legal* remainders, an equitable recovery will not bar the legal remainders^o. The rule may be generally stated, that where the tenant, against whom the writ in a common recovery is brought, has only an equitable estate of freehold, the recovery, suffered upon that

^m *Bowater v. Elly*, 2 Vern. 344. Indeed it has been said, that a common bargain and sale by cestuique trust, is alone sufficient to bar the entail. 1 Vern. 440. 2 Vern. 133. But that opinion has been overruled. 1 P. W. 91. 1 Ves. 260. *Legate v. Sewell*, 2 Vern. 552. *Kirkham v. Smith*, Amb. 518. With respect to copyhold lands, where there is no particular custom to bar the entail of the legal estate, it seems, that a mere devise by cestuique trust is sufficient to bar the entail of the trust.

See *Otway v. Hudson*, 2 Vern. 533. and Mr. Cox's note to *Dunn v. Green*, 3 P. W. 10.

ⁿ *North v. Champernoou*, 2 Cha. Ca. 63. 78. 1 Vern. 13. S. C. 1 P. W. 91. S. C. *Carpenter v. Carpenter*, 1 Vern. 440. *Beverley v. Beverley*, 2 Vern. 131. *Boteler v. Allington*, 1 Bro. Cha. Ca. 72.

^o *Robinson v. Cuming*, 1 Atk. 473. *Salvin v. Thornton*, 1 Bro. Cha. Ca. 73. in note. Amb. 545. 699. S. C. *Shapland v. Smith*, 1 Bro. Cha. Ca. 74.

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equitable freehold, cannot bar a legal estate tail vested in the vouchee, or any legal remainder. But the converse is not true; for if a legal, as well as beneficial, estate of freehold is conveyed to the tenant to the writ, the recovery will bar an equitable estate tail in the vouchee, and all equitable remainders expectant upon it^p.

Married women.

When a married woman is entitled to an equitable freehold interest, not settled to her separate use, it is necessary, that she should concur with her husband in levying a fine, in order to pass it: but when personal property is settled to the separate use of a *feme covert*, she is, generally speaking, entitled to dispose of it, in the same manner, as if she were a *feme sole*, although there be no express power of disposition reserved to her^q. But where an annuity, or annual income, is settled to the separate use of a married woman, she

^p See *Philips v. Brydges*, 3 Ves. 120. 128. *Goodrich v. Brown*, 2 Freem. 189. 1 Cha. Ca. 49. It has recently been determined, that where an equitable tenant in tail conveys to a mortgagee in fee, and afterwards suffers a recovery, it is not necessary, that the mortgagee should concur in making the tenant to the præcipe. *Nouaille v. Greenwood*, *Turner's Cha. Rep.* 26.

^q In *Peacock v. Monk*, 2 Ves. 191. lord Hardwicke says, "That as to

"personal estate, undoubtedly where there is an agreement between husband and wife before marriage, that the wife shall have to her separate use, either the whole or particular parts, she may dispose of it by an act in her life, or by will; she may do it by either, though nothing is said of the manner of disposing of it." See *Wagstaff v. Smith*, 9 Ves. 520. *Surgeon v. Crop*, 13 Ves. 190. *Heatley v. Thomas*, 15 Ves. 596.

may be restrained from appointing the unaccrued payments of it^r.

SECT. VIII.

Of trusts, as more immediately referring to the person and acts of cestuique trust.

There is a difference as to real property. In the anonymous case, 2 Ves. 192. it is said, that as to real estate, there must be an express power of appointment, in order to enable a feme covert to devise or convey it; but as to personal estate, the separate property of the wife, it is incident to it, that she may make a will or appointment of it. It has since been held^s, that where a real estate is settled to the separate use of a married woman during her life, she may, without any express power of appointment for that purpose, convey her equitable estate for life by deed, without the aid of a fine. I apprehend however, that when an estate in fee-simple is conveyed for the separate use of a married woman, without an express power of appointment reserved to her, she cannot during her coverture, dispose of the fee-simple without concurring with her husband in levying a fine.^s

It may be proper here to observe, that when stock was settled upon a *feme covert*, for life for her separate use, and after her death, upon such trusts, as she should, either covert or sole, by *will* appoint, and for want of ap-

^r Per Lord Chanc. in *Pybus v. Smith*, 2 Bro. Cha. Ca. 347. *Jackson v. Hobhouse*, 2 Mer. 483. See *Mores v. Huish*, 5 Ves. 694. But otherwise in the case of a male. *Brandon v. Robinson*, 18 Ves. 429. ^s *Burnaby v. Griffin*, 3 Ves. 266.

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Of trusts, as
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tuique trust.

pointment, in trust for her executors and administrators for their own use and benefit, it was determined, that the wife could not, during coverture, dispose of the stock by deed; and the Master of the Rolls observed, that the restriction was only during the wife's then coverture^a.

In *Anderson v. Dawson*, 15 Ves. 532. personal estate was settled upon a feme covert for life, for her separate use, and after her decease, upon such trusts, as she should by will appoint, and for want of appointment, in trust for her next of kin, their executors, administrators, and assigns, according to the statute for the distribution of intestates' effects; and it was decided, that the claims of the next of kin could only be defeated by a due exercise of the power of appointment^b.

It seems, that where money is directed to be laid out in the purchase of land to be settled upon a *feme covert*, either in fee-simple, or in tail, with the immediate reversion in fee to herself; she may, by an application to the Court of Chancery, and upon being solely and separately examined by analogy to the form of a fine at law, obtain the payment of the money^c; although it should seem, that

^a *Socket v. Wray*, 4 Bro. Cha. Ca. 483.

^b See *Heatley v. Thomas*, 15 Ves. 596.

^c *Oldham v. Hughes*, 2

Atk. 452. *Pearson v. Brereton*, 3 Atk. 71. *Cunningham v. Moody*, 1 Ves. 176. *Binford v. Bawden*, 1 Ves. J. 512.

where a feme covert is entitled to the interest of personal estate for life, and not settled to her separate use, the court will not upon examination allow her to part with her life interest^d.

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Of trusts, as more immediately referring to the person and acts of cestuique trust.

When personal estate is settled for the separate use of the wife for life, and if she survive her husband, then upon her absolutely; and if she die in the lifetime of her husband, then upon such trusts, as she shall by deed or will appoint, and for want of such appointment upon her executors and administrators: or, if it be settled to the separate use of the wife for life, and if the husband survive the wife, then upon him absolutely; but if she survive the husband, then upon herself absolutely: in neither case, will the court, upon the application and examination of the wife during coverture, allow the settled property to be transferred^e.

It is sometimes a question, what words will create a trust for the separate use of a *feme covert*. In *Tyrrell v. Hope*, 2 Atk. 561. the Master of the Rolls observed, that the word *enjoy*, was very strong to imply a separate use to the wife. A direction to pay rents or interest, “into the hands of the testator’s

^d *Fraser v. Baillie*, 10 Ves. 580. See *Lee v. Bro. Cha. Ca.* 518. *Muggeridge*, 1 Ves. and B. 118.

^e *Richards v. Chambers*, 118.

SECT. VIII. “daughter, for her own use and benefit^f,”
 and a direction, “that trustees should not be
 Of trusts, as more immediately referring to the person and acts of cestuique trust.
 “troubled to see to the application of any
 “sum or sums paid to Ann Hill, and Sophia
 “Lee, but their receipts in writing respec-
 “tively shall be a sufficient discharge to my
 “said trustees^g ;” have been considered suffi-
 cient to create a trust for the separate use
 of a feme covert ; but it has been lately deter-
 mined, that the words, “*for her own use and*
 “*benefit*,” will not have that effect^h.

Tenants for life. (4. c.) It has been decided, that a fine, or
 other alienation by cestuique trust for life,
 will not operate as a forfeiture of his trust
 estateⁱ, nor will such fine, or other convey-
 ance, by him, destroy any contingent remain-
 ders expectant upon his life estate^u.

SECT. IX.

IX. It remains to consider the trustee,
 and the nature of his estate and office.

Of the trustee,
 his estate and
 office.

Who may be
 trustees.

(1.) The modern doctrine of trusts differs
 perhaps in no instance so essentially from the
 system of uses, as in the construction of
 courts of equity, upon the capacity or liability
 of persons to act as trustees.

^f Hartley v. Hurle, 5
 Ves. 540.

^g Lee v. Prideaux, 3
 Br. Cha. Ca. 381.

^h Wells v. Sayers, 4 Mad.
 409. Roberts v. Spicer, 5
 Mad. 491. But see Jones v.

—, cited 5 Ves. 520. and
 Kirk v. Paulin, 7 Vin. 95.

ⁱ Lethieulier v. Tracy, 3
 Atk. 728. Whetstone v.
 Bury, 2 P. W. 146.

^u 1 Ves. 27.

Formerly, we have seen, that the intention of the parties has been frequently frustrated by the rigid adherence of the Court of Chancery to the technical scruples of the common law; for uses were considered as annexed to the estate of the feoffees in the land, and not to the land itself. Against the notion of an use attaching upon the land, we find the following curious argument:—"It is absurd to say, that confidence and trust can be reposed in land, which want sense; and which in regard of sense is inferior to brute beasts; and it would be less absurd to say, that beasts may be trusted, who have sense and want reason, than land, which wants sense and reason also, should be trusted^w." But notwithstanding the force of this grave argument, the courts of equity in later times have said, that a trust shall never fail on account of the disability, or non-appointment, of the trustee; because they hold, that the trust, if properly created, will fasten upon, and attach to the land, intended to be made subject to it^x. The king^y, or a corporate^z body, may be a trustee; and where an estate was devised to the separate use of a *feme covert*, without the intervention of trustees, it was determined, that the husband should be

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Of the trustee,
his estate and
office.^w 1 Co. 127.

Vern. 439. 1 Ves. 453.

^x *Moggridge v. Thackwell*, 3 Bro. 517.

3 Atk. 309.

^y *Kildare v. Eustace*, 1^z 1 Ves. 467, 468. 536. 2

Vern. 412.

SECT. IX. a trustee for his wife^a. So in a case^b, where
 Of the trustee, a devise to a corporation (in trust) was void
 his estate and by the late statute of mortmain, the court
 office. decree, that the heir at law of the devisor
 should be a trustee for the purposes of his
 will.

But although the courts now generally consider the trust as attaching upon the land itself, so as to convert all persons, seised of, or acquiring the legal interest, into trustees, yet this rule has an exception in the case of a conveyance by a trustee for a valuable consideration to one, who has no notice of the trust^c. In this instance the purchaser shall not be affected by the trust.

Of incum- (2.) The rule will be further exemplified
 brances of, and by considering, how the estate of the trustee
 forfeitures by, is affected by his own acts or incumbrances.
 the trustee at
 law.

Before the statute of uses, the estate of the feoffee was subject to all the incidents, to which a real ownership was liable; owing to this very notion, that the use was annexed to the estate of the person seised of the legal interest, and not to the land itself; and there-

^a Bennett v. Davies, 2 Freem. 43. pl. 47. 1 P. P. W. 316. 2 Ves. 665. W. 278, 279. See as to

^b Sonley v. Clock-makers' Company, 1 Bro. 81. the use before the statute, ante 58.

^c Snagg's case, cited 2

fore if privity of estate failed in the person, acquiring the legal seisin, there was an end of the use. Hence arose just complaints against uses, and their inconveniences. After the introduction of trusts, the Court of Chancery considered the trustee as having the legal ownership, so far only as to be beneficial to *cestuique trust*, and without being subject to any disadvantage, which may arise from the trustee personally, in consequence of his seisin of the legal estate.

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office.

The legal estate vested in the trustee, is in equity, protected against his judgments, and other incumbrances, and against his bankruptcy^d; and from the dower and freebench^e of his wife; and from the tenancy by curtesy of the husband of a female trustee^f.

In *Geary v. Bearcroft*^g, it is said, that if “a man conveys lands in trust, and the trustee commits felony, these lands shall be forfeited, though he may have relief in equity.” It is the same, I apprehend, if the trustee commit treason; for as the *cestuique trust* forfeits his estate for treason, it is not consonant to justice, that the trustee should

^d See 1 P. W. 278. 1 Bro. 278. 2 P. W. 318. 3 P. W. 187. note A.

^e See *Hinton v. Hinton*, 2 Ves. 634. 638. *Noel v. Jevon*, 2 Freem. 43. *Be-*

vant v. Pope, 2 Freem. 71.

^f *Casborne v. Inglis*, 7 Vin. Ab. 157.

^g *Carter*, 67. But see *Lane*, 39. 54.

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office.

forfeit it for the same offence. In the case of *Pawlet v. the Attorney-general*^b, baron Atkyns strongly supported this opinion, upon the ground, that the king is the fountain and head of justice and equity; and that it shall not be presumed, that he will be defective in either: and that it would derogate from the king's honour to imagine, that what is equity against a common person, should not be equity against him. Since, however, the late statuteⁱ, it is not probable, that a question will arise, in the case of the king, either upon the felony, or treason of a trustee. The case of a subject, claiming as lord by escheat, is

^b Hard. 465.

ⁱ 39, 40 Geo. 3. c. 88. s. 12. it is enacted, "That
" it shall be lawful for his
" majesty, his heirs and
" successors, by warrant,
" under his or their sign-
" manual, to direct the ex-
" ecution of any trusts or
" purposes to which any
" manors, messuages, lands,
" tenements, or heredita-
" ments, which have es-
" cheated or shall escheat
" to his majesty, his heirs
" or successors, shall have
" been liable at the time
" the same so escheated
" respectively, or would
" have been liable in
" the hands of any his
" majesty's subjects; and
" to make any grants of
" such manors, lands, te-
" nements, and heredita-
" ments, respectively, to

" any trustee or trustees,
" or otherwise, for the ex-
" ecution of such trusts;
" and to make any grants
" of any lands, tenements,
" or hereditaments, which
" have escheated, or shall
" escheat as aforesaid to
" any person or persons,
" either for the purpose of
" restoring the same to any
" of the family of the per-
" son or persons whose es-
" tates the same had been,
" or of rewarding any per-
" son or persons making
" discovery of any such es-
" cheat, as to his majesty,
" his heirs or successors
" respectively, shall seem
" fit; any thing in the
" said acts, or any of them,
" to the contrary notwith-
" standing." See 47 Geo.
3. sess. 2. c. 24. and 59
Geo. 3. c. 94.

more doubtful. In the case of *Eales v. England*^k, the Master of the Rolls said, “ If the trustee die without heir, the lord, by es-
 “ cheat, will have the land at law ; yet sub-
 “ ject to the trust here.” The point, I be-
 lieve, has not been directly determined^l.

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 office.

In a case, where a bill was brought to redeem a mortgage, which had vested in the king by the attainder of the heir of the mortgage, sir Matthew Hale was of opinion, that the king could not in equity be compelled to reconvey; but that an *amoveas manum* only lay in such case, and that was all which could be done, in case a trustee forfeited his estateⁿ.

In *Reeve v. the Attorney-general*, 2 *Atk.* 223. an estate, escheated to the crown, was charged in equity by the will of the person dying, and for want of whose heir the estate escheated, with several legacies. The bill was brought by the legatees to have the estate sold, and the question was, whether an estate escheated to the crown can be affected by a trust. The bill was dismissed. See *S. C.* cited 1 *Ves.* 446. where it is reported lord Hardwicke said, that where the crown

^k *Prec. Cha.* 200. 1 *Eq. Ab.* 384, in note. *Contra* in *Peachy v. Somerset*, *Prec. Cha.* 454.

^l See the arguments in *Burgess v. Wheate*, 1 *Eden.* 177.

ⁿ *Pawlett v. the Attorney-general*, *Hard.* 467.

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office.

was a trustee, the court had no jurisdiction to decree a conveyance, but they must go to a petition of right. S. C. cited in *Hovendon v. lord Annesley*, 2 Schoal. 617.

Trustees inca-
pacitated; as
infants, &c.
Conveyances by
them.

(3.) The legislature has, in several instances, enabled trustees incapacitated, or restrained from conveying, to execute conveyances of the legal estate, vested in them as trustees. By the statute of 7 Anne, c. 19., infants having estates in lands by way of trust or mortgage, are enabled under the direction of the Court of Chancery to convey the lands, of which they are trustees^m.

^m Whereas many inconveniences do and may arise, by reason that persons under the age of one-and-twenty years, having estates in lands, tenements, or hereditaments, only in trust for others, or by way of mortgage, cannot (though by the direction of the cestuique trust or mortgagor) convey any sure estate in any such lands, tenements, or hereditaments, to any other person or persons: for remedy thereof be it enacted by the queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That from and after the 10th day of May 1709,

it shall and may be lawful to and for any such person or persons under the age of one-and-twenty years, by the direction of the High Court of Chancery, or the Court of Exchequer, signified by an order made upon hearing all parties concerned, on the petition of the person or persons for whom such infant or infants shall be seised or possessed in trust, or of the mortgagor or mortgagors, or guardian or guardians of such infant or infants, or person or persons entitled to the monies secured by or upon any lands, tenements, or hereditaments, whereof any infant or infants are or shall be seised or possessed by way of mortgage, or of the person or persons entitled to the redemption thereof,

It is conceived, that this act extends only to express, and not to mere constructive, trusts; and indeed there are several determined cases, grounded upon this distinctionⁿ; and although the lord chancellor King, in the case *ex parte Vernon*^o, made an order for an infant to convey, under a constructive trust, on account of the small value of the estate, he expressly declared, that, where there is no declaration of trust in writing, he should, for the future, leave the trustee to bring his bill, and have a decree against the infant, to convey.

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The case of *Price v. Oneby*, in 1745, and noticed by Mr. Fearne in his posthumous works^p, is indeed an instance, in which the statute of Anne was not confined to express trusts, but extended to trusts arising under a decree. That, however, was the case of a partition, which, as Mr. Fearne observes, was

to convey and assure any such lands, tenements, or hereditaments, in such manner as the said Court of Chancery or the Court of Exchequer shall, by such order, so to be obtained, direct, to any other person or persons; and such conveyance or assurance, so to be had and made as aforesaid, shall be as good and effectual in law to all intents and purposes whatsoever, as if the said in-

fants or infant were, at the time of making such conveyance or assurance, of the full age of one-and-twenty years: any law, custom, or usage, to the contrary in any wise notwithstanding.

ⁿ *Goodwyn v. Lister*, 3 P. W. 387. *Anon. ibid.* 389. in note A.

^o 2 P. W. 549.

^p *Fearne's Post. Works*, 239.

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for the infant's benefit, and what he was compellable to do, by law: and it is to be observed, that in a subsequent case^a, decreed in 1753, which was also a decree upon a partition, the court refused to direct any conveyance of the legal estate, until one of the parties (an infant) came of age.

The case of *Smith v. Hibbart*^r is supposed to record the opinion of lord Thurlow, that a constructive trust is within the statute of Anne: but in a late instance, in the case of *Jerdon v. Foster*^s and others, at the Rolls, there was a reference to the master, to ascertain and state, whether an infant, subject to a constructive trust, was a trustee within the statute of Anne; and he reported, that the infant was not a trustee within that statute. The report was confirmed, but I have not learnt, that the point was argued.

The statutes 39, 40 Geo. 3. c. 88. s. 12. and 47 Geo. 3. sess. 2. c. 24. before noticed, have authorized the king to direct the execution of any trusts affecting lands, which have become vested in him in consequence of escheat, forfeiture, or otherwise; and by the statute

^a *Tuckfield v. Buller*, Amb. 197.

^r 2 Dick. 730.

^s The decrees in this case are in March 1804, and

June 1804. The master's report is dated the 17th of March 1809, and the decree confirming the report, the 12th of April 1809.

4 Geo. 2. c. 10.^a, idiots and lunatics, and their committees, are empowered, under the

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" It enacts, " That from
 " and after the 24th day of
 " June 1731, it shall and
 " may be lawful to and for
 " any such person or per-
 " sons being idiot, lunatic,
 " or *non compos mentis*, or
 " for the committee or
 " committees of such per-
 " son or persons, in his, her,
 " or their name or names,
 " by the direction of the
 " lord chancellor of Great
 " Britain, or the lord keep-
 " er, or commissioners of
 " the great seal of Great
 " Britain for the time be-
 " ing, signified by an order
 " made upon hearing all
 " parties concerned, on the
 " petition of the person or
 " persons for whom such
 " person or persons, being
 " idiot, lunatic, or *non*
 " *compos mentis*, shall be
 " seised or possessed in
 " trust, or of the mort-
 " gage or mortgagors, or
 " of the person or persons
 " entitled to the monies se-
 " cured by or upon any
 " lands, tenements, or he-
 " reditaments, whereof any
 " such person or persons
 " being idiot, lunatic, or
 " *non compos mentis*, is, or
 " are, or shall be seised or
 " possessed by way of
 " mortgage, or of the per-
 " son or persons entitled
 " to the redemption thereof,
 " to convey and assure
 " any such lands, tene-
 " ments, or hereditaments,
 " in such manner as the
 " lord chancellor of Great
 " Britain, or lord keeper,
 " or commissioners of the
 " great seal of Great Bri-
 " tain, shall, by such or-
 " der, so to be obtained,
 " direct, to any other per-
 " son or persons ; and such
 " conveyance or assurance,
 " so to be had and made
 " as aforesaid, shall be as
 " good and effectual in law,
 " to all intents and pur-
 " poses whatsoever, as if
 " the said person or per-
 " sons being idiot, lunatic,
 " or *non compos mentis*,
 " was, or were, at the
 " time of making such
 " conveyance or assurance,
 " of sane mind, memory,
 " and understanding, and
 " not idiot, lunatic, or *non*
 " *compos mentis*, or had by
 " him, her, or themselves,
 " executed the same ; any
 " law, custom, or usage to
 " the contrary in any wise
 " notwithstanding."

By the 1, 2 Geo. 4. c.
 114. it is enacted, " That
 " from and after the passing
 " of this act, it shall and
 " may be lawful to and for
 " the lord chancellor of
 " Great Britain, or the lord
 " keeper, or commissioners
 " of the great seal of Great
 " Britain for the time being,
 " by an order made on the
 " petition of the person or
 " persons, for whom such
 " person or persons being
 " idiot, lunatic, or *non com-*
 " *pos mentis* (but not having
 " been found such by inqui-
 " sition), shall be seised or

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direction of the lord chancellor, to convey lands vested in them in trust, or by way of mortgage^a.

General devises
by trustees.

(4.) If a trustee devises all the real estates, of which he is seised, to A. and his heirs

“ possessed in trust, or of
“ the mortgagor or mort-
“ gagors, or of the person
“ or persons entitled to the
“ monies secured by or upon
“ any lands, tenements, or
“ hereditaments, whereof
“ any such person or per-
“ sons, being idiot, lunatic,
“ or *non compos mentis* (but
“ not having been found
“ such by inquisition), is, or
“ are, or shall be seised or
“ possessed by way of mort-
“ gage, or of the person or
“ persons entitled to the
“ equity of redemption
“ thereof, to appoint such
“ person or persons as to
“ the lord chancellor, lord
“ keeper, or lords commis-
“ sioners of the great seal of
“ Great Britain respectively
“ shall seem meet, on behalf
“ of such person or persons,
“ being so idiot, lunatic, or
“ *non compos mentis*, as
“ aforesaid, to convey and
“ assure any such lands, te-
“ nements, or hereditaments
“ in such manner as the
“ lord chancellor of Great
“ Britain, or lord keeper, or
“ lords commissioners of the
“ great seal of Great Bri-
“ tain, shall by such order so
“ to be obtained, direct, to
“ any other person or per-
“ sons; and such convey-
“ ance and assurance so to

“ be had and made as afore-
“ said, shall be as good and
“ effectual in law, to all in-
“ tents and purposes what-
“ soever, as if the said per-
“ son or persons, being idiot,
“ lunatic, or *non compos*
“ *mentis*, was or were, at the
“ time of making such con-
“ veyance or assurance, of
“ sane mind, memory, and
“ understanding, and not
“ idiot, lunatic, or *non com-*
“ *pos mentis*, and had by
“ him, her, or themselves, so
“ conveyed and assured
“ such lands, tenements, and
“ hereditaments; any law,
“ custom, or usage to the
“ contrary in anywise not-
“ withstanding.

“ And be it further enact-
“ ed, That all and every such
“ person or persons, being
“ to be appointed by virtue
“ of this act, shall and may
“ be empowered and com-
“ pelled by such order so as
“ aforesaid to be obtained,
“ to make such conveyance
“ and conveyances, assur-
“ ance or assurances as
“ aforesaid, in like manner
“ as trustees or mortgagees
“ of sane memory are com-
“ pellable to convey, sur-
“ render, or assign their trust
“ estates or mortgages.”

^a Upon the construction
of this act, see *ex parte*

generally; the legal estate, of which he is trustee, will pass to the devisee, subject to the original trust^w. But if the real estate of the trustee is devised for purposes, or under limitations, inconsistent with the trust, under which the trustee holds the legal estate, the devise will not include the trust property; as if the devise be of all the trustee's real estates to A., in trust to sell, or to A. for life, with remainder to his first and other sons succes-

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Tutin, 3 Ves. and B. 149. See as to the transfer of stock by trustees, not qualified, 36 Geo. 3. c. 90.

^w *Braybrooke v. Inskipp*, 8 Ves. 417.

Ex parte Whitacre in the matter of Samuel Vallis, an infant. At the Rolls, 22d of July 1807.

A mortgagee in fee devised "all the rest and residue of his lands and hereditaments, and goods, chattels, mortgages, monies, and securities for money, and all other his real and personal estate, not thereinbefore disposed of, unto his nephews Samuel Rolles, John Rolles, and Samuel Vallis, and to his grand-nephew Samuel White, to be equally divided between and among them as tenants in common, and to their respective heirs, executors, and administrators, according to the nature of their respective estates;" and the testator appointed the said four de-

visees, executors of his will.

Samuel Vallis, one of the devisees, died, leaving an infant heir at law; and it was referred to the master to inquire, whether the infant heir was a trustee or mortgagee within the statute of 7th Anne. The master reported, that as the words in the residuary clause appeared to him to be sufficiently comprehensive to include the legal estate in the mortgaged premises, he conceived, that the freehold and inheritance of the said mortgaged premises passed by the will of the mortgagee to the said Samuel Rolles, John Rolles, Samuel Vallis, and Samuel White, as tenants in common: and he was of opinion that the said Samuel Vallis was an infant mortgagee of one fourth part of the mortgaged premises. The master's report was confirmed, and the infant was directed to convey pursuant to the act.

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sively in tail, or to A. in tail, or to A. and his heirs, charged with the payment of the testator's debts and legacies ; for as, in these cases, the trustee could not equitably bind the estate with limitations, or subject it to equitable interests, of this kind, courts of justice will presume, that he did not intend to devise the trust estate.

The rule, which I have stated, may, I think, be considered as the result of recent determinations; but the decisions have been various and contradictory^x. The old rule was otherwise; for the courts of law, not looking beyond the bare legal estate, did not distinguish between the legal and beneficial interest; and therefore considered all property, to which the trustee had a legal right, as *his* property; and as such passing by a devise of *his* estate^y. It is perhaps to be lamented, that the old rule, simple in itself, and not liable to misconstruction, has not prevailed.

The construction of a devise by a trustee, or mortgagee, of a legal estate, must properly be determined in a court of law; and by

^x See *duke of Leeds v. Munday*, 3 Ves. 348. Ex parte *Sergison*, 4 Ves. 147. *Attorney-general v. Buller*, 5 Ves. 339. Ex parte *Brettell*, 6 Ves. 577. *Attorney-general v. Vigor*, 8 Ves. 276. *Braybrooke v. Inskipp*, 8 Ves. 417. Ex

parte *Morgan*, 10 Ves. 433.

^y *Marlow v. Smith*, 2 P. W. 193. Ex parte *Bowes*, cited in note 1 Atk. 605. See recital in an act 9 Geo. 3. for vesting the estates of the earl of Stafford in trustees to be sold.

adopting the modern rule, courts of law must in some degree notice trusts, which in other instances they are careful to avoid. It can however be understood, that when upon the face of the instrument, vesting the legal estate in the trustee, there is an express trust declared, a court of law may take notice, that the person devising, has the character of a trustee, without materially blending the jurisdictions of law and equity.

SECT. IX.

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his estate and
office.

But it is difficult to discover any principle, upon which a court of law can adopt the modern rule, in the case of a *constructive* trust. For instance, if A. contracts to sell a real estate to B., and dies before the conveyance is made to the purchaser, having, subsequently to the contract, devised all his *real* estates to C. in tail: a court of law, before it can decide, that the estate, contracted to be sold, did not pass under the devise, must previously determine, that A. is a trustee for B^a.

The preceding observations will apply to conveyances by trustees of all their real estates. It is in general considered, that a bar-

General conveyances by
trustees.

^a In *Wall v. Bright*, 1 Jac. and Walk. 494. it was held, that an estate, under contract for sale, passed by a devise of lands to trustees, in a case, where if the devise had been by a bare trustee, it would not have passed.

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gain and sale by commissioners of a bankrupt of all the bankrupt's real estate, does not at law pass property, of which he is trustee. It is observable, however, that the case of *Bennet v. Davies*^z does not support this doctrine. The words of the Master of the Rolls are, "as if the bankrupt had been a trustee for J. S., his bankruptcy should not IN EQUITY affect the trust estate;" and in that case, the legal estate, it was thought, passed to the assignee.

Of purchases
made by the
trustee of the
trust estate.

(5.) As courts of equity have been anxious to provide for the inconveniences arising at law from the alienation, incumbrances, and forfeitures of the trustee, so they are extremely cautious in confirming purchases made by him of the trust estate. In the case of *Whelpdale v. Cookson*, where a trustee for the sale of land, purchased part of the trust estate for himself, lord Hardwicke declared, that he would not let the purchase stand good, although another person, being the best bidder, bought it for him at a public sale; for he knew the dangerous consequence; nor was it enough for the trustee to say, You cannot prove any fraud, as it was in his own power to conceal it^a. We have already seen, that

^z 2 P. W. 316.

^a 1 Ves. 9. S. C. This rule has been confirmed by many subsequent cases. See *Whitchcote v. Lawrence*,

3 Ves. 740. *Campbell v. Walker*, 5 Ves. 678. *Ex parte Reynolds*, *ibid.* 707. *Ex parte Hughes*, 6 Ves. 617. *Ex parte Lacy*, *ibid.*

when a trustee renews a lease, of which he is a trustee, the renewed lease shall be subject to the old trusts.

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office.

(6.) As the legal interest is vested in the trustee, he is consequently a necessary party to all suits commenced for, and against, the

Of suits by the
trustee.

625. *Lister v. Lister*, *ibid.*

631. *Ex parte James*, 8

Ves. 337. *Coles v. Tre-*

cothick, 7 *Ves.* 234. Where

a security is made by way

of mortgage with a power

of sale, the donee of the

power is a trustee within

the rule. *Downes v. Graze-*

brook, 3 *Mer.* 200. In

Montesquieu v. Sandys, 18

Ves. 313. lord Eldon ob-

serves, "There is no autho-

rity establishing, nor was

it ever laid down, that an

attorney cannot purchase

from his client, what was

not in any degree the ob-

ject of his concern as at-

torney." See also *Woods*

v. Downes, 18 *Ves.* 120.

Hooper v. Goodwin, *Cooper*,

95. and note a. 3 *Mer.*

209. In *Sanderson v. Wal-*

ker, 13 *Ves.* 601. lord

Eldon has also observed,

"The principle has often

been laid down, that a

trustee for sale may be

the purchaser in this sense;

that he may contract with

his cestuique trust; that

with reference to the con-

tract of purchase, they

shall no longer stand in

the relative situation of

trustee and cestuique trust;

and that the trustee hav-

ing, through the medium

of that sort of bargain,

evidently, distinctly, and

honestly proved, that he

had removed himself from

the character of trustee,

his purchase may be sus-

tained."

In order to rescind a pur-

chase made by the trustee

for sale, the application must

be made within a reason-

able time (*Price v. Byrn*,

cited 5 *Ves.* 681. and the

arguments of the Master of

the Rolls, *ibid.* 682. 11

Ves. 226. *Gregory v. Gre-*

gory, *Cooper*, 201.); except

in the case of a body of cre-

ditors, against whom it is

said, that laches does not

apply (*Anon. in Exch.*

cited 6 *Ves.* 632.); and the

case of a charity, *Attorney-*

general v. lord Dudley,

Cooper, 146.

In *sir George Colebrook's*

case, cited 6 *Ves.* 622. the

lord chancellor *Thurlow*

said, that in case of a pur-

chase by a trustee or assign-

ee for the benefit of cre-

ditors, the confirmation of

the purchase by the majority

of the creditors, will not

bind the individual creditors,

who did not confirm.

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Of the trustee,
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trust property. Generally, indeed, the cestuique trust should be also made a party^b; although the trustee may not only sue in his own name^c, but in some instances he should not bring his *cestuique trust* before the court on pain of incurring costs^d.

Whether the
trustee may re-
lease or com-
pound debts.

(7.) It is, generally speaking, a rule, that a trustee releasing or compounding a debt, due to the trust estate, must answer for the loss occasioned by such release or composition^e. Yet this rule must always depend upon the particular circumstances of the case; for where a trustee in releasing or compounding a debt, acts from prudential motives, and with a view to benefit the trust property, the courts will consider his conduct, not only excusable, but in many instances, laudable^f. On the other hand, where a trustee buys in an incumbrance for less money, than is actually due, the trust estate shall receive the benefit of the composition^g.

He cannot alter
the nature of
the trust pro-
perty.

(8.) A trustee cannot (without an express power for that purpose) alter the nature of the trust property^h, either by converting land

^b 1 Har. Cha. Pract. 247. W. 381.

^c Ibid. Toth. 285.

^d 2 Atk. 48.

^e See Jevon v. Bush, 1 Vern. 342. George v.

Chansey, 1 Cha. Rep. 125.

Blue v. Marshall, 3 P.

^g 3 P. W. 251. note A.

Darey v. Hall, 1 Vern. 49.

Morrett v. Paske, 2 Atk. 54.

^h See Earlom v. Saunders, Amb. 241.

into money, investing money in the purchase of landⁱ, or by taking a lease for lives instead of renewing a lease for years^k, so as to vary the right of succession to such property; unless it be under particular circumstances, and evidently for the benefit of the trust estate^l.

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office.

(9.) As the trustee cannot prejudice *cestuique trust* by doing what his trust does not authorize, so he cannot, in general, injure him by omitting to do, what his office requires him to perform^m. Therefore, where an entry was made and a fine levied by a stranger during the infancy of *cestuique trust*, and the trustee neglected to enter for the purpose of avoiding the fine, the Court of Chancery determined, that the infant should not suffer for the laches of his trusteeⁿ. The exception to the rule is in the case of a purchaser or creditor^o.

His laches will
not prejudice
a cestuique
trust.

(10.) When money is invested in the purchase of stock in the names of trustees, they have no power to change the security, unless

He cannot vary
securities with-
out an express
power.

ⁱ Rook v. Warth, 1 Ves. 461. Tullit v. Tullit, Amb. 370.

^k Witter v. Witter, 3 P. W. 99. See Milner v. Harewood, 18 Ves. 274.

^l Terry v. Terry, Prec. Cha. 273. Vernon v. Vernon, cited 3 Brown, 513. Inwood v. Twine, Amb. 417.

^m 3 P. W. 215. 2 Atk. 406. No fraudulent or unnecessary delay on the part of trustees, shall affect the interests of third persons. Vide 1 Meri. 433. in Bernard v. Montague.

ⁿ Allen v. Sayer, 2 Vern. 368.

^o Note G. 3 P. W. 310. Vide ante 291.

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they are expressly allowed so to do by the trust; and therefore, if they take upon themselves to use a discretionary power in this respect, they are liable to answer for any loss, which may happen to the trust fund; it being in the election of the *cestuique trust*, either to have the individual stock restored to him, or the money, for which it was sold by the trustees^p. But while the original stock remains vested in their names, or if they purchase any other stock in pursuance of a power reserved to them, they will not be answerable for the falling of such original stock in the one instance, nor of the new fund in the other^q. But it is to be observed, that when there is a decay of the trust funds, all the *cestuique trust* must suffer equally; and therefore if the trustee, in that case, shows any preference, he must answer for it out of his

^p Harrison v. Harrison, 2 Atk. 121. Bostock v. Blakeney, 2 Bro. 653. Pocock v. Reddington, 5 Ves. 794. Note, that an executor, investing his testator's money in the purchase of three per cent. cons. or red. bank annuities, will not be liable in consequence of the fall of that stock, Ex parte Champion, cited 3 Bro. 434. Howe v. earl of Dartmouth, 7 Ves. 137. Holland v. Hughes, 16 Ves. 111. "The rule is never to permit a trustee

"or executor, after a decree, to lay out money on mortgage, without a previous application to the Court." Per lord Eldon in Widdowson v. Duck, 2 Mer. 494.

^q Jackson v. Jackson, 1 Atk. 513. Anon. 1 P. W. 648. The discretionary power of trustees to vary securities, is not controlled by the Court of Chancery, unless ruinously exercised. De Manneville v. Crompton, 1 Ves. and B. 354.

own estate^r. In a case^s, where a power was given to trustees to invest monies *in government funds, or other good securities*, it was said by lord Hardwicke, that neither South-sea stock, nor Bank stock^t, were considered as a good security; because it depended upon the management of the governors and directors; and was subject to losses; but that it was different as to South-sea and Bank annuities.

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office.

(11.) Where a trust was created by will, for the maintenance of infants, and the trustee, in the lifetime of the father, applied the interest of the trust fund for that purpose, lord Thurlow said, that it was contrary to all rules, that the interest vested in the children should be applied for their maintenance in the lifetime of the parent; for that would amount to a gift to the parent of so much, as should be necessary for the maintenance^u. This rule applies only to cases, where the parent has the ability to provide for his children^w. But a trustee may in some instances exceed the letter, if he conform to the spirit, of the trust. Thus in a case^x, where a trust

When necessary to conform
to the letter of
the trust.

^r Tilsey v. Throckmorton, 2 Cha. Ca. 132.

^s Trafford v. Boehm, 3 Atk. 444.

^t Not a *bond*. Wilkes v. Steward, Coop. 6. Langston v. Ollivant, *ibid.* 33.

^u Andrews v. Partington, 3 Bro. 60.

^w See Butler v. Butler, 3 Atk. 60. and the note to the last ed.

^x Franklin v. Green, 2 Vern. 137. Warr v. Warr, Prec. Cha. 213. Swinnock v. Crisp, 2 Freem. 78. But see 4 Ves. 368. in Lee v. Brown.

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tee of money for an infant, payable at 21, or marriage, with a power of maintenance in the mean time, paid part of the principal for placing the infant out as an apprentice; the court, upon the death of the infant under 21, unmarried, allowed the trustee what he had so paid, notwithstanding the money was limited over upon the event, which had happened. I may here add the case^x where a sum of money was directed to be laid out in the purchase of freehold lands only, and the court dispensed with the strict direction, and approved of the purchase of a college lease at the same time with the freehold. The court seemed inclined to act in the same manner, where money was directed to be laid out in the purchase of land within a particular district^y.

In *Gaskell v. Harman*, 11 Ves. 489. 507. the Lord Chancellor acceded to the principle, that no fraudulent or unnecessary dilatory dealing by trustees, shall affect third persons; and in *Bernard v. Montague*, 1 Mer. 422. where there was a trust to raise certain sums out of real estate, out of the rents and profits, or by mortgage, the Master of the Rolls observed, that in creating the alternative, it must be taken, that the testator did not give to the trustees a power, which they were at

^x *Gosselin v. Dodwell*, cited 3 Atk. 414.

^y *Maynwarding v. Maynwarding*, 3 Atk. 413. So, where the time appointed

for sale by trustees has elapsed. *Witchcot v. Souch*, 1 Cha. Rep. 183. See *Moseley v. Moseley*, Finch, 53.

liberty to exercise according to their own pleasure.

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office.

In the common case, where there is a trust to raise money for portions, &c. by mortgage, or by and out of the annual rents and profits, and the estate, subject to the payment thereof, is settled upon A. for life, with remainders over, it is usual to raise the money by mortgage, by which means, the money becomes a charge upon the inheritance, and the tenant for life is obliged to keep down the interest; for it would be a hardship on the tenant for life, if the money were raised at his expense, out of the annual rents and profits, in favour of those in remainder.

(12.) Against accidental losses, which When liable to
happen to the trust estate, the courts are accidental
anxious to relieve the trustee; if such losses losses.
do not happen through his own neglect or default. If the trustee is robbed of the trust-money, the courts consider, whether he has kept it, as he would his own money^r. Does his banker fail, whereby a loss accrues to the trust fund? Equity inquires, whether the banker was in credit, at the time the money was paid into his hands^a. Does an agent of

^r *Morley v. Morley*, 2 *Ionor*, 2 Ves. 85. *Ex parte*
Cha. Ca. 2. *Jones v. Lewis*,
2 Ves. 240. *Belchier*, Amb. 219. But
see *Rider v. Bickerston*, 5

^a *Knight v. Plymouth*, 3
Atk. 480. *Horsley v. Cha-*
Ba. Ab. 401. pl. 12.

SECT. IX. the trustee becomes insolvent? The question is, whether he is in good circumstances at the time of his nomination^b.
 Of the trustee, his estate and office.

Trustees to preserve contingent remainders.

(13.) When trustees are appointed to preserve contingent remainders, if they join in any conveyance in order to destroy those remainders, this shall in general be deemed a breach of trust^c, whether the settlement be voluntary, or not^d. In some particular instances, however, the courts have ordered the trustees to make conveyances in order to defeat the contingent estates; but it would be prudent for trustees to receive the directions of a court of equity before they agree to destroy those estates, which they are appointed to preserve^e.

Trustee may concur with cestuique trust in tail, to bar the entail.

(14.) But whenever cestuique trust is entitled to an estate tail, which he alone might

^b Anon. 12 Mod. 560.

“ If one devise to trustees,
 “ and by express clause
 “ therein, give them power
 “ to appoint agents to manage the land, and they
 “ appoint one then solvent
 “ and good, though afterwards he prove insolvent,
 “ they shall not answer for him; *secus* if he were not
 “ solvent at the time, at which he was nominated.
 “ But if there were no such
 “ direction or power in the will, the trustees are
 “ bound to answer for their

“ agents at all events.”

^c *Pye v. George*, 2 Salk. 680. 1 P. W. 128. S. C. *Else v. Osborn*, 1 P. W. 388. *Woodhouse v. Hoskins*, 3 Atk. 22.

^d *Mansell v. Mansell*, 2 P. W. 678. *Symance v. Tatton*, 1 Atk. 613.

^e The cases upon this subject are collected, in the case of *Moody v. Walters*, 16 Ves. 283.; and the above doctrine is there much discussed. See *Biscoe v. Perkins*, 1 Ves. and B. 485.

have barred by an equitable recovery ; then it will not be a breach of trust, if the trustee join with him in a conveyance to bar the entail, and to pass the legal estate ; for his joining in this case, is nothing more, than what he is compellable to do^f.

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Of the trustee
his estate and
office.

(15.) It is said to be a rule in Chancery, that if lands are vested in trustees in fee-simple, in trust for one, and the heirs of his body, with remainder over; the trustees are not to convey an estate in fee-simple to the tenant in tail; but an estate tail; although such tenant in tail will have it in his power to bar the entail, with the remainder over by a recovery^g. So if a sum of money be agreed to be laid out in land, and the lands to be settled in tail, with remainders over; the settlement shall be made accordingly, and the money shall not be paid to the tenant in tail; because there is a chance of his death before a recovery should be suffered, which can only

Trustee is not
to convey the
legal estate in
fee-simple to
cestuique trust
in tail.

^f 1 Eq. Ab. 384. (E.) note A. Carteret v. Carteret, 2 P. W. 134. A conveyance was made to a purchaser, and his trustee, and the heirs of the purchaser. The purchaser by will, devises to B. in tail, with remainders over. The trustee survived the purchaser; so that B. could not suffer a recovery without the aid of the trustee.

It was decreed, that the trustee should convey to B. in tail, with the remainders over, according to the will. Young v. Leigh, Cary, 95. 20 Eliz. In Carteret v. Carteret, the court refused to compel the trustee to join in making a tenant to the præcipe; but directed the trustee to convey the legal estate tail to the tenant.

^g 1 Eq. Ab. 395.

SECT. IX. be done in term-time^h. But if the remainder

Of the trustee, in fee had in this case been limited to the tenant, his estate and office.

^h Short v. Wood, 1 P. W. 470. and the cases cited in note 1. to Collett v. Collett, 1 Atk. 12. 3d ed. But now by the statute 40 Geo. 3. c. 56. it is enacted, "That from and after passing of this act, in all cases where money, under the control of any court of equity, or of or to which any individuals, as trustees, are possessed or entitled, shall be subject to be invested in the purchase of freehold or copyhold hereditaments, or both, to be settled upon any person or persons in such manner that it would be competent, in case such money had been invested in the purchase of real estates, for the person or persons who would be the tenant or tenants of the first estate or estates tail therein, either alone or together with the person or persons who would be the owner or owners of the particular preceding estate or estates therein, if any, by deed, fine, or common recovery, or any of them, or other lawful act, in the case of freehold hereditaments, or by surrender and recovery, or either of them, or other lawful act, in the case of copyhold hereditaments, to bar the first estate or estates tail, and the rights and interests of all persons in remainder, it shall not be necessary to have such

money actually invested in lands or hereditaments, in order that such estates tail and remainders over may be so barred, but that it shall and may be lawful to and for the High Court of Chancery, or such court of equity under the control of which such money shall be, and in the case of trustees, to and for the said High Court of Chancery in a summary way, upon petition of the person or persons who would be tenant or tenants of the first estate or first estates tail, and of the person or persons who would be the owner or owners of the antecedent particular estate or estates, if any, in the lands and hereditaments, in case the same were purchased, such petitioners being adults, and in case where any of the parties are or is femes covert or a feme covert, she or they being first separately examined in court, or upon a commission, and consenting, to order the monies subjected to such trusts to be paid to the petitioners, or any of them, or to be paid and applied in such manner and for such purposes as the petitioners shall appoint, and the court shall approve of.

"And be it further enacted, That in all cases where monies subjected to be laid out in the purchase of

nant in tail, then it seems, that the Court of SECT. IX.
 Chancery might have directed the money to Of the trustee,
 his estate and
 office.
 be paid to him; because he might have
 barred the limitation by a fine, which may
 be levied in vacation time, as well as in
 termⁱ.

(16.) The courts of equity look upon trusts Of allowances
 to trustees for
 their care.
 as honorary, and not undertaken upon mer-
 cenary motives^k; and therefore in the case of
 Robinson v. Pett^l, lord Talbot said, it was an
 established rule, that a trustee should have
 no allowance for his care and trouble in the
 management of the trust; for if on those pre-
 tences, allowances were to be made, the trust

hereditaments to be settled as aforesaid, shall happen to be invested in government or real or other securities, all such securites shall, for the puposes of this act, be considered as money, and shall and may accordingly be transferred, assigned, and disposed of under an order of the respective courts aforesaid, made in a summary way upon the petition of such persons, and with such examination and consent, where necessary, as aforesaid, in such and the same manner as monies subjected to be laid out in the purchase of hereditaments, to be settled as aforesaid, are hereinbefore authorized to be paid, applied, and dis-

posed of."

It should seem, that from the time of the order, the fund becomes converted into personality.

The act seems to meet the case of a husband and wife successively tenants for life. But I doubt, whether a feme covert entitled to a jointure rent-charge is within the act. The rent seems to be an incumbrance and not a particular estate.

ⁱ See cases *supra*. 3 Atk. 447.

^k 2 Atk. 60. 406.

^l 3 P. W. 251. S. C. See *French v. Baron*, 2 Atk. 120. note 3. In the matter of *Annesley, Amb.* 78. *Chambers v. Goldwin*, 5 Ves. 834. 9 Ves. 254.

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Of the trustee,
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might be loaded, and rendered of little value ; that a great difficulty might attend in settling and adjusting the *quantum* of such allowance, especially as one man's time might be more valuable, than that of another ; and that it could be no hardship upon any trustee ; for it was at his option either to accept, or refuse, the trust. But if a trustee come in a fair and open manner, and tell cestuique trust, that he will not act in such a troublesome and burdensome office without further compensation given by cestuique trust, over and above the terms of the trust, and such terms be contracted for between them, this contract, lord Hardwicke observed^m, would not perhaps be set aside, though there was no precedent, wherein such a bargain had been confirmed.

But though a trustee be not allowed for his trouble, it seems, that if he employ a bailiff to manage the trust estate, he must be allowed for the employment of, and payments made to, such bailiffⁿ.

Of allowances
in respect of ex-
penses incurred
by the trustees.

(17.) Notwithstanding trustees are not allowed any thing for their trouble and care in the management of the trust estate, it is reasonable, that they should be allowed all costs and expenses, which may be incurred in the execution of the trust, and the discharge of

^m 2 Atk. 60.

ⁿ Bonithorn v. Hockmore, 1 Vern. 316. Forest v. Elwes, 2 Mer. 68.

their office; provided there be no mismanagement, nor breach of trust^o. Therefore lord King said^p, it was a rule, that a trustee ought to be saved harmless by cestuique trust, as to all damages relating to the trust. Thus, where a trustee has honestly and fairly, without any possibility of being a gainer, laid down money, by which the cestuique trust was discharged from being liable to pay a greater sum, or from a plain and great hazard of being so, the trustee ought to be repaid^q.

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(18.) If a trustee, said lord Hardwicke^r, err in the management, and be guilty of a breach of trust, yet if he quit it with the approbation of cestuique trust, the breach ought in the first place to fall on the estate of cestuique trust, who consented to it; for the courts are ever anxious to deliver the trustee from any misapplication of the trust-money.

Where a breach of trust shall fall upon the estate of cestuique trust.

And lastly. Where there are two or more trustees, the rule is, that each of them shall be charged for his own wilful neglect, default, or breach of trust only; and that the innocent trustee shall not suffer for the misconduct of his co-trustee. Therefore it has been decided, that a trustee, who has joined

Trustee chargeable for what he shall receive.

^o Hithersell v. Hales, 2 Cha. Rep. 158. and Finch Rep. 361. 12 Mod. 560. 2 Cha. Ca. 138.

^p 2 P. W. 455.

^q Balsh v. Hyham, *ibid.*

453.

^r 3 Atk. 444.

SECT. IX. in a voucher for the whole trust-money, but
 Of the trustee, his estate and office. has in truth only received a part of it, shall
 be charged for so much only, as has actually
 come to his hands^s; unless indeed fraud, or
 what is tantamount to it, gross negligence,
 should appear in the transaction^t.

^s See Leigh v. Barry, 3 Atk. 584. note 2. last ed. See lord Shipbrook v. lord Hinchinbrook, 11 Ves. 252.
^t Bridgm. 38. Keble v. Thompson, 3 Bro. 112. 16 Ves. 477. S. C.

APPENDIX.

APPENDIX, No. I.

Proviso shifting the Use upon Neglect or Refusal to take a Name, and bear certain Arms.

PROVIDED always, and it is hereby agreed and declared between and by the said parties hereto, that every husband of each of them the said Eliz. L., Letitia L., and Arabella L., and of each of their daughters, who under or by virtue of the limitations, hereinbefore contained, or of these presents, shall become entitled to the actual possession or receipt of the rents and profits of the said manors and other hereditaments expressed to be hereby granted and released, shall apply for, and endeavour to obtain, an act of parliament, or proper license from the crown, or take such other ways or means, as may be requisite or proper to enable or authorize him to take and use the surname of L. only, and no other surname, and to quarter the arms of L. with his own family arms within the time hereinafter mentioned, that is to say, if the wife of such husband shall be entitled to the actual posses-

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sion or receipt of the rents and profits of the said manors and other hereditaments at the time of her marriage; then within the space of one year after such marriage; but if the wife of such husband shall not be entitled to the actual possession or receipt of the rents and profits of the said manors and other hereditaments at the time of her marriage, then within one year after she shall so become entitled as aforesaid; and also, that every other person, who under or by virtue of the limitations hereinbefore contained, or of these presents, shall be entitled to the actual possession or receipt of the rents and profits of the said manors and other hereditaments expressed to be hereby granted and released, shall within one year after he shall so become entitled to the possession or receipt of the rents and profits of the said manors and other hereditaments, apply for, and endeavour to obtain, an act of parliament or proper license from the crown, or take such other ways or means, as may be requisite or proper, to enable or authorize him to take and use the surname of L., and no other surname, and to quarter the arms of L. with his own family arms; and that in case any such person or persons shall refuse, or neglect, to take such surname and arms, and to take and use the steps or means which shall be requisite or proper to enable and authorize him or them so to do, by the space of one year to be computed as afore-

said, then if the person so refusing or neglecting shall be the husband of either of them the said Elizabeth L., Letitia L., and Arabella L., the limitation hereinbefore contained to the use of such of them, whose husband shall so refuse or neglect, and to the use of her husband after her death, shall cease, determine, and become absolutely void; and if such person so refusing or neglecting shall be the husband of any daughter of them the said Elizabeth L., Letitia L., and Arabella L., the limitation hereinbefore contained to the use of the daughter, whose husband shall so refuse or neglect, and her heirs male, shall cease determine, and be absolutely void: and in case the person so neglecting or refusing shall be any other than such husband as aforesaid, the limitation hereinbefore contained to the use of such person and the heirs male of his body, shall cease, determine, and be absolutely void; and the said manors and other hereditaments shall in either of such cases immediately thereupon go to the person next beneficially entitled in remainder under the limitations hereinbefore contained, in the same manner as if the person or persons whose estate or estates shall so cease, determine, and become void, being tenant or tenants for life, was or were dead, or being tenant or tenants in tail, was or were dead without issue inheritable under such entail, without prejudice nevertheless to any portion or

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portions, lease or leases, which previously to such cesser or determination, shall have been charged, made, or created, by virtue, or under the exercise of, any of the powers hereinafter contained. And it is hereby further agreed and declared between and by the said parties hereto, that the cesser or determination of any estate or estates of any tenant or tenants for life, by virtue of the proviso hereinbefore contained, shall not operate to exclude, prevent, or prejudice any of the contingent remainders hereinbefore limited to the son or sons, daughter or daughters of such tenant or tenants for life, or any other person or persons; but that the remainder hereinbefore limited to the said trustees and their heirs during the life of every such tenant for life, shall after such cesser or determination, take effect and continue for preserving such contingent remainders, and giving them effect, as they may arise; and that immediately from or after such cesser or determination of such preceding estate or estates for life or lives, and during the suspense and contingency of such then expectant remainder, the said A. and B. and their heirs, shall receive, pay, and apply the rents and profits of the said manor and other hereditaments which would belong to such tenant or tenants for life, if such cesser or determination had not taken place, unto the person or persons for the intents and purposes, and in the manner to, for,

and in which, the same rents and profits would be, or would have been payable or applicable, under, or by virtue of, the limitations and provisoes hereinbefore contained, in case such tenant or tenants for life was or were actually dead ; so that from and immediately after such cesser or determination the issue of each such tenant or tenants for life, entitled for the time being under the limitations aforesaid to the said manors and other hereditaments in remainder, immediately expectant upon the decease of such tenant or tenants for life, may be entitled to the rents and profits of the said manors and other hereditaments for his and their own use and benefit during the life of the parent, as if such parent were dead ; and that in case no such issue be in existence, then during the vacancy or contingency of such issue, the person next beneficially entitled for the time being under the limitations aforesaid, to a vested remainder in the said manors and other hereditaments expectant upon the decease of such tenant or tenants for life, and failure of his, her, or their issue, shall and may be entitled to the said rents and profits for his and their proper use and benefit respectively, but without any exclusion of, or prejudice to, the estate, interest, or right of any such issue afterwards coming into existence, but only from the time of the birth of such issue respectively.

APPENDIX, No. II.

*Proviso for shifting the use upon the Accession
of another Estate.*Appendix,
No. II.

PROVIDED always, and it is hereby agreed and declared between and by the said parties hereto, that if the manor of and hereditaments in the county of mentioned and comprised in the settlement made in consideration of, and previously to the marriage of A. B., bearing date, &c., and thereby limited and settled upon or to the use of him the said A. B. for life, shall at any time, by or under the uses and limitations in the same settlement contained, descend or come for an estate tail in possession to, or upon, the elder or any other son of the said C. D. on the body of the said E. F. begotten, born in the lifetime of the said C. D. or in due time after his decease, or to or upon the issue male of such elder or other son, so as to be in the actual possession or receipt of the rents and profits thereof, and there shall be living any other son of the body of the said C. D. on the body of the said E. F. begotten, than the son to or upon whom, or upon whose issue male, such estate shall come or descend, or any heirs male of the body of such other son, then and in that case, and so often as the same shall happen, the use or uses hereinbefore limited to or for the benefit of such son, or

his issue male, upon whom such manor and hereditaments, in the county of _____ shall descend or devolve for an estate tail in possession as aforesaid, and his or their issue male, of and in all and singular the hereditaments hereinbefore granted and released, or intended so to be respectively as aforesaid, shall cease, determine, and become void, as if such son or issue male was or were actually dead without issue male of his or their body or bodies; and then and thenceforth the same hereditaments hereby granted and released shall immediately go and remain to the use of such person and persons, as by virtue of the limitations hereinbefore contained would then be entitled, as the person or persons next in remainder, to the same hereditaments, in case such son or issue male, so becoming entitled to the said manor of _____ and hereditaments, in the county of _____ as aforesaid, was or were then dead without issue male of his or their body or bodies; and the same person or persons shall in every such case be entitled to take the same estate and estates in the said hereditaments hereby granted and released, as he or they would have been entitled to take therein by virtue of these presents, if such son, or issue male, so becoming entitled to the said manor and hereditaments, in the county of _____ was or were actually dead without issue male as aforesaid.

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APPENDIX, No. III. a.

Power to lease for 21 Years in Possession at Rack-rent.

Appendix,
No. III. a.

PROVIDED always, and it is hereby agreed and declared between and by the said parties hereto, that it shall and may be lawful for the said A. B. from time to time during his life, and after his decease then for the guardian or guardians for the time being of any child or children of the said A. B. on the body of the said C. D. to be begotten, who by virtue of, or under the limitations hereinbefore contained, shall be entitled to the possession or receipt of the rents and profits of the hereditaments hereby granted and released, or intended so to be, from time to time during the minority or respective minorities of such child or children, to demise or lease all or any, or any part or parts of the hereditaments hereby granted and released, or intended so to be, with the appurtenances, to any person or persons for any term or number of years not exceeding 21 years in possession, and not in reversion or by way of future interest, so that there be reserved and made payable in every such lease during the continuance thereof, the best and most improved yearly rent or rents, to go along with, and be incident to, the immediate reversion of the premises so to be

leased, that can or may be reasonably had or gotten for the same, without taking any fine, premium, or foregift for the making thereof, and so that in every such lease there be contained a condition of re-entry on non-payment of the rent or rents to be thereon, or thereby, respectively reserved by the space of 21 days next after the same shall become due and payable, and so that the lessee or respective lessees, to whom such lease or leases shall be made, seal and deliver a counterpart or counterparts of such lease or leases, and so that no lessee to whom any such lease shall be made, be by any clause or words therein contained authorized to commit waste, or exempted from punishment for committing waste.

Appendix,
No. III. a.

APPENDIX, No. III. b.

Power to lease for three Lives in Possession or Reversion, at ancient or accustomed Rents.

PROVIDED always, and it is hereby agreed and declared between and by the said parties to these presents, that it shall and may be lawful for the said A. B. during his life, and after his decease for the guardian or guardians for the time being of any child or children of the said A. B. on the body of the said C. D. lawfully to be begotten, who by virtue of, or under, the limitations hereinbefore contained, shall for the time being be entitled to the pos-

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session or receipt of the rents and profits of the said manors and other hereditaments hereby granted and released, or intended so to be, during the minority or respective minorities of such child or children, by any deed or deeds, or by copy or copies of court roll, to demise, lease, or grant such part and parts of the said manors and other hereditaments as are now, or have been usually demised or leased, or have been granted by copy of court roll for one or more life or lives, or for years, determinable on the dropping of one or more life or lives, to any person or persons for one, two, or three lives, or for any term or number of years, determinable on the death or deaths of one, two, or three person or persons, either in possession or in reversion, and to accept or take any fine or premium for the making or granting of every such lease or grant; so that there be not more than three lives in being at most upon any part of the said premises so to be granted or leased at any one time; and so that no such grantee, or lessee, his, her, or their heirs, executors, administrators, or assigns, be made dispunishable of waste by any express words therein; and so that upon every such grant or lease the usual and accustomed rents, heriots, and services at the least, or proportional rents, heriots, and services, where a greater or lesser part of any farm or farms, tenement or tenements, shall either separately, or together with any other part or parcel of

the same premises or other lands, be demised or granted, or rents, heriots, or services, amounting in the aggregate to the usual rents, heriots, or services, where two or more farms or tenements shall be granted or demised together, be reserved and made payable during the continuance of such grant or lease. And it is hereby agreed and declared, that such rent or rents to be reserved upon every such grant or lease shall be incident to, and shall go along with, the immediate reversion expectant on such grant or lease; and that in every such grant or lease (other than upon grants or demises by copy of court roll) there shall be contained a clause of re-entry for non-payment of the rent or rents to be thereby reserved for the space of 21 days after any part thereof shall become due, and that the respective lessees of the said freehold hereditaments shall execute counterparts of their respective leases; provided always, that if any such grant or lease shall be made by the guardian or guardians of any infant child or children for the time being entitled as aforesaid, then the fine or premium, fines or premiums which shall be received upon every such lease or grant shall be considered as part of the personal estate of the child or children for the time being entitled to the possession or receipt of the rents and profits of the hereditaments, which shall be so granted or demised as aforesaid.

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THE following form of a leasing power was prepared by the Author's friend, Peter Bellinger Brodie, Esq. and settled by him and the Author.

It is proper to observe, that when it was intended to authorize the grant of reversionary leases under a power of leasing, the practice seems to have been to enable the donee of the power to grant a lease to commence from, or after, the expiration of the existing lease; but as the grant of such a lease was, in effect, the grant of an *interesse termini*, it did not carry the immediate reversion expectant on the subsisting lease, nor the rent reserved upon the first lease: it was a lease to commence *in futuro*. A lease granted under such a power was objectionable on this ground: that if the second lease was granted to commence at a future period, beyond the limits allowed by the policy of the law for perpetuities, it might be considered altogether void. The following power was framed to obviate this inconvenience, in a case where the property, the object of the power, was subject to subsisting leases.

“ Provided always, and it is hereby agreed
“ and declared between and by the parties to
“ these presents, that it shall be lawful for
“ the said A. B. and C. D., and the survivor
“ of them, and the executors or administra-
“ tors of such survivor, from time to time and
“ at all times hereafter, with the consent of
“ the within mentioned William Marmont the
“ elder, during his life, and after his decease
“ with the consent of the person, who for the
“ time being shall, under and by virtue of the
“ limitations contained in the said recited in-
“ denture of appointment, release, and settle-
“ ment, be tenant for life, or in tail male in
“ possession, or actually entitled to the re-
“ ceipt of the rents, issues, and profits of the
“ manors, hereditaments, and premises, there-
“ by limited, and for the time being remaining
“ in strict settlement, if such person shall be
“ of the age of 21 years or upwards; but if
“ such person shall be under that age, then,
“ during the minority of such person, with
“ the consent of his guardian or guardians
“ (every such consent to be testified by some
“ writing under the hand or hands of the
“ person or persons whose consent shall, for
“ the time being, be requisite), by any deed or
“ deeds, instrument or instruments, in writ-
“ ing, either referring to, or not referring to,
“ this present power, to be sealed and de-
“ livered by the said A. B. and C. D., or the
“ survivor of them, or the executors or admi-

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“ nistrators of such survivor, in the presence
“ of, and attested by, two or more credible
“ witnesses, to demise or lease the messuages
“ and hereditaments comprised in the leases
“ particularized in the first schedule written
“ under, or annexed to, these presents, or any
“ of them, or any part or parts thereof, to
“ any person or persons whomsoever, for any
“ term not exceeding 99 years, to take effect
“ in possession, and not in reversion or by
“ way of future interest, and at such yearly
“ rent or rents to be reserved on every such
“ demise or lease, and to be made payable
“ during the term thereby to be created, as
“ the said A. B. and C. D., or the survivor of
“ them, or the executors or administrators of
“ such survivor, shall in their or his full dis-
“ cretion, and without being answerable or
“ accountable for the exercise of such discre-
“ tion, think fit; and so that there be con-
“ tained in every such demise or lease, a
“ clause in the nature of a condition for re-
“ entry on the non-payment of the rent or
“ rents (not being a peppercorn rent) there-
“ by to be reserved, in case the same, or any
“ part thereof, shall be in arrear for the space
“ of 21 days next after the same shall become
“ due and payable; and so that the lessee or
“ lessees be not, by any clause or words to be
“ contained therein, made punishable for
“ waste, or exempted from punishment for
“ committing waste; and for the granting

“ every such demise or lease, the said A. B.
“ and C. D., and the survivor of them, and
“ the executors or administrators of such
“ survivor, shall accept as a fine or premium
“ such a sum of money as they or he shall,
“ in their or his full discretion, and without
“ being answerable or accountable for the
“ exercise of such discretion, think fit.”

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“ And it is hereby further agreed and
“ declared, that concurrent leases may be
“ granted under the power hereinbefore con-
“ tained ; and that every lease, to be granted
“ under the said power, shall be valid and
“ effectual, notwithstanding, at the time of
“ granting such lease, the hereditaments
“ therein comprised, shall be subject to one
“ or more existing lease or leases thereof.”

“ And it is also further provided, agreed,
“ and declared, that the sums to be raised
“ by the said A. B. and C. D., or the survivor
“ of them, or the executors or administrators
“ of such survivor, by fines or premiums, on
“ the granting of the lease or leases under
“ the power aforesaid, shall not exceed in the
“ whole the sum of £ .”

“ And it is also hereby further agreed and
“ declared, that the receipts in writing of the
“ said A. B. and C. D., or the survivor of
“ them, or the executors or administrators

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“ of such survivor, for any sum or sums of
 “ money, which shall be accepted by him or
 “ them, as fines or premiums for the granting
 “ of any lease or leases, under the power
 “ hereinbefore contained, shall effectually
 “ discharge the person or persons paying the
 “ same ; and that no such lease to be granted
 “ under such power as aforesaid shall be
 “ invalidated, notwithstanding more than
 “ the sums hereby authorized to be raised,
 “ shall have been so raised.”

APPENDIX, No. III. d.

Power to grant repairing or building Leases.

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PROVIDED always, and it is hereby agreed and declared between and by the said parties hereto, that it shall and may be lawful to and for the said John Jones, during his life, and after his decease, to and for the person, who, by virtue of, or under the limitations hereinbefore contained, shall, for the time being, be entitled to the first estate of freehold or inheritance of and in the said manors and other hereditaments, expressed to be hereby granted and released, in case such person shall be of full age, but if not, then for the guardian or guardians for the time being, of such person during his minority, to demise or lease all or any or any part of the said hereditaments

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situate and being in or near
in the county of _____ and of the
wastes or commons within the manors of _____
or either of them, unto any
person or persons who shall be willing to
take the same, for the purpose of effectually
repairing any building or buildings, which
shall be standing, or being on the heredi-
taments so to be demised or leased, or for
the purpose of rebuilding or of erecting a
new building or new buildings upon the he-
reditaments, which shall be so demised or
leased, or any part thereof, with liberty to
take or pull down any erection or building,
erections or buildings then standing or being
upon the hereditaments so to be demised or
leased, for the purpose of rebuilding or new
building as aforesaid, or any part thereof,
and to make use of the materials for the
purpose of such rebuilding or new building ;
and also to lay out and appropriate any part
or parts of the ground, which shall be thereby
demised or leased, as for a yard or garden,
or for any other convenience, to be held,
occupied, or enjoyed, with any such building
or buildings ; so that every such demise or
lease, for the purpose of new building or re-
building, be made for any term or number of
years, not exceeding the term of 61 years ;
and so that every such demise or lease, for
the purpose of effectually repairing any mes-
suage or tenement, building or buildings, be

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made for any term or number of years not exceeding the term of 31 years ; and so from time to time, and in like manner, to demise or grant a new lease or new leases, for rebuilding, new building, or repairing the same hereditaments or any part thereof, for such term or terms respectively as aforesaid ; and so that every such demise or lease shall take effect in possession and not in reversion, or by way of future interest, and so that upon every such demise or lease, to be made in pursuance of this power, there be reserved to be paid and payable half yearly or oftener, during the continuance thereof, and to be incident to, and to go along with, the immediate remainder or reversion expectant on the determination thereof, the best and most beneficial rent or rents, that at the time of granting thereof (considering the nature and circumstances of the case) can be reasonably had or obtained for the same hereditaments so to be demised or leased, and so that in every such lease or demise, a condition of re-entry be reserved in case of non-payment of the rent or rents thereby to be reserved by the space of 21 days next after any part of such rent or rents shall become due, and so that the lessee or lessees to be named in each such lease, seal and deliver a counterpart thereof.

APPENDIX, No. III. e.

Power to grant building Leases on waste or uncultivated Lands.

PROVIDED always, and it is hereby agreed and declared between and by the said parties hereto, that it shall and may be lawful to and for the said A. B. during his life, and after his decease to and for the person, who, by virtue of or under the limitations hereinbefore contained, shall, for the time being, be entitled to the actual possession, or receipt of the rent and profits, of the said manors and other hereditaments expressed to be hereby granted and released, in case such person shall be of full age, but if not, then for the guardian or guardians for the time being of such person during his minority, to grant, demise, or lease, as well all or any part or parts of the said hereditaments hereinbefore expressed to be hereby granted and released, which consist of uncultivated or waste lands, as also all or any part or parts of the said hereditaments, which have been at any time or times since the date and execution of the said recited indenture of the day of or which shall or may at any time or times hereafter, be allotted in respect of the said manor and other hereditaments hereby grant-

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ed and released, or any of them or any part thereof, from or out of any common or commons, or waste lands whatsoever, that have been, or shall or may at any time or times hereafter, be divided and enclosed, unto any person or persons, for one, two, or three life or lives, or for any term or number of years, determinable on the death or deaths of one, two, or three person or persons, either in possession or reversion, so that there be no more than three lives in being at most upon any part of the said lands so to be demised or leased, at any one time, together with full and free liberty, license, power, and authority, to dig for, and work up, any stone, which may be found in or under the lands so to be demised or leased, for the purpose of erecting and building such houses, cottages, and other buildings as hereinafter are mentioned; and also to dig clay, gravel, sand, peat, or other soil, which may be necessary for the making of bricks or tiles, to be used in or about the building and erecting such houses, cottages, and other buildings, or in or about the manuring and improving the lands so to be demised or leased as last mentioned; and also to erect, build, and set up in any convenient place or places upon the lands so to be demised or leased as last mentioned, all such hovels, sheds, or other buildings, as shall from time to time be necessary for the burning or making such bricks or tiles, as

aforesaid, or for the placing of any workmen, horses, carriages, utensils, or materials to be employed or used in or about the digging of such stone, gravel, sand, or other soil, or the making or burning of such bricks or tiles, as aforesaid, or in or about the cultivating, planting, improving, and enclosing the same lands respectively; and also full and free liberty, license, power, and authority, to erect, build, and set up, in any convenient place or places in or upon the said lands so to be demised or leased as last mentioned, any houses, cottages, or other buildings, which it may be deemed necessary or expedient to erect or build thereon, for the better carrying on the cultivation and improvement of such lands respectively, and for the habitation and accommodation of the respective lessees thereof, or their under-tenants, workmen, servants, or agents; so that in every such last mentioned lease, all mines, minerals, and quarries, in or under the lands to be thereby respectively demised (except as before mentioned), and full powers for working, raising, and carrying away the same, be expressly excepted and reserved; and so that upon every such last mentioned lease, there be reserved and made payable during the continuance thereof, the best yearly rent or rents, reservation or reservations, which, under the circumstances of the case, can be reasonably had or gotten for the same, without taking

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any fine, premium, or foregift in respect thereof; and so that in every such last mentioned lease, there be contained a condition of power of re-entry for non-payment of the rent or rents, reservation or reservations, to be thereby reserved; and so as the lessee or respective lessees, to whom every or any such lease shall be made, duly execute a counterpart thereof, and thereby enter into such covenants and agreements for the tilling, manuring, cultivating, planting, improving, and enclosing the lands to be comprised in such lease, and for the building, repairing, and keeping in repair, the houses, cottages, and buildings thereon, or to be erected thereon as aforesaid, and for preserving the boundaries and limits of the same lands respectively, and for the training up and preserving the trees and saplings already growing or hereafter to be set or planted thereon, as shall be deemed necessary or proper; and also (if it shall be thought necessary or proper) to enter into any covenant or covenants, for the renewal or renewals of any such last mentioned lease, either perpetually or for a limited time, by the person for the time being seised of, or entitled to, the said manors and other hereditaments comprised in such lease, by adding a new life or lives, in the place or stead of any *cestuique vie*, or *cestuisque vie*, who shall die, at or under the yearly rent or rents reserved upon the preceding lease, and

upon payment on each renewal of two years improved value of the premises, of which the lease shall be so renewed, as or by way of fine, or upon the reservation of such an additional rent, as shall be equivalent to such improved value, and in lieu thereof, so that there be not more than three lives in being at most upon any part of the said lands so to be leased and demised, at any one time, and to grant any lease or leases in pursuance of such covenant or covenants for renewal; and which said covenant or covenants for renewal shall be binding and conclusive upon the person or persons, who for the time shall (subject to such lease or leases) be seised of or entitled to the said lands and hereditaments, the lease or leases of which shall be so required to be renewed.

Appendix,
No. III. e.

APPENDIX, No. III. f.

Power to grant mining leases.

PROVIDED always, and it is hereby further agreed and declared between and by the said parties to these presents, that it shall and may be lawful to and for the said A. B. during his life, and after his decease, to and for the person, who, by virtue of or under the limitations hereinbefore contained, shall, for the time being, be entitled to the actual pos-

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session or receipt of the rents and profits of
the said manors and other hereditaments in
the said counties of

expressed to be hereby granted and released, in case such person shall be of full age, but if not, then to and for the guardian or guardians for the time being, of such person during his minority, to grant, demise, and lease, all and every or any of the mines, veins, and seams of iron, ironstone, and coal, and other mines or minerals, and quarries, found or discovered, or which shall or may at any time or times hereafter be opened, found, or discovered in, under, or upon any of the same manors or other hereditaments in the said counties of _____ or either of them; and also any part or parts of the same lands and hereditaments, which it shall or may be thought expedient to demise and lease with such mines and quarries, for the better and more effectually working the same, unto any person or persons for any term or number of years not exceeding _____ years, to take effect in possession, and not in reversion, or by way of future interest, together with full and free liberty, license, power, and authority, to search for, take, use, and dispose of all such iron, ironstone, coals, and other metals and minerals whatsoever, as shall be found in the same mines, veins, seams, and quarries, and to sink, win, work, and make groves, shafts, drifts, trenches, sluices, way-

gates, watergates, and watercourses, and to erect any furnace or furnaces, fire or other engines, mills, or gins, and to use all other lawful ways and means whatsoever, as well for the finding, discovering, winning, working, and getting of iron, ironstone, coals, and other metals or minerals, forth and out of the said mines and quarries, as for avoiding and carrying away water, foul air, or stench from, forth, and out of the same; and also full and free liberty, license, power, and authority, to take and use sufficient ground-room, heap-room, and pit-room, for laying, placing, and manufacturing the iron, ironstone, coals, earth, and rubbish, that shall from time to time proceed from, or be wrought, dug, or gotten out of, the said mines and quarries; and also full and sufficient ways, paths, and passages, to and for the respective lessees to be named in such demises or leases, and their agents, workmen, and servants, from time to time, during the continuance of such leases respectively, to take and carry away with horses, carts, wains, waggons, and other carriages, all the iron, ironstone, coals, metals, and minerals, which shall, from time to time, be wrought, won, or gotten, in, forth, from, and out of, the said mines and quarries thereby to be demised or leased; and also full and free liberty, license, power, and authority to erect, build, and set up, in any convenient

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place or places, near any of the said mines or quarries so to be demised or leased, all such houses, hovels, lodges, sheds, or other buildings, as shall from time to time be needful, or convenient for the standing, laying, and placing any workmen, horses, gear, utensils, or materials, to be employed or used in or about the working of the said mines and quarries respectively; and to dig, and get up, stone, peat, or clay, for erecting, building, and repairing such houses and other buildings, and to do whatsoever else shall be deemed needful or requisite in or about, or for, the winning, working, obtaining, getting, washing, cleansing, and smelting, of iron, ironstone, coals, metals, and minerals from, forth, and out of the said mines and quarries, and for the manufacturing, taking, and carrying away the same, so that upon every such lease there be reserved and made payable, during the continuance thereof, the best and most improved yearly rent or rents, tolls, duties, and reservations that can, under the circumstances of the case, be reasonably had or gotten for the same, without taking any fine, premium, or foregift, for the making thereof, and so that in every such lease there be contained a condition or power of re-entry for the non-payment of the rent or rents, tolls, duties, or reservations, to be thereby respectively reserved, at such time or times

after the same shall become due, as shall be thought proper or deemed advisable; and so that the respective lessees to be named in such leases duly execute counterparts thereof respectively, and enter into such covenants and agreements for the due and punctual rendering and paying the rent or rents, tolls, duties, and reservations to be thereby respectively reserved, and for the working and managing of the said mines and works, and for the building, repairing, and keeping in repair, the houses, cottages, and other buildings to be mentioned in such leases respectively, as shall be deemed necessary, or as shall be thought proper and reasonable.

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APPENDIX, No. IV. a.

Power enabling a Tenant for Life in Possession to limit a Rent-charge by way of Jointure.

PROVIDED always, and it is hereby agreed and declared between and by the said parties hereto, that it shall and may be lawful for the said A. B. by any deed or deeds, instrument or instruments in writing, with or without power of revocation and new appointments, to be by him sealed and delivered in the presence of, and attested by, two or more credible witnesses; or by his last will

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and testament in writing, or any codicil or codicils thereto, to be by him signed and published in the presence of, and attested by, three or more credible witnesses, but subject, and without prejudice, to the said yearly rent-charge of £ and the powers and remedies hereinbefore limited for enforcing the payment thereof, and to the aforesaid term of 99 years under the trusts aforesaid, for better securing the same yearly rent-charge, to limit or appoint to, or to the use of, or in trust for, any woman or women, whom he shall or may marry, for her or their life or respective lives, and for, or by way of, her or their jointure or respective jointures, and in bar, or without being in bar, of her or their dower or respective dowers, and either before or after marriage, any annual sum or annual sums of money, or yearly rent-charge or yearly rents-charge, not exceeding for one woman the yearly sum of £ of lawful money of Great Britain, to be issuing and payable out of, and charged and chargeable upon, all or any part of the manor and other hereditaments expressed to be hereby appointed and released, free from taxes, and without any other deduction whatsoever, and to be paid in such manner, as to the said A. B. shall seem meet; and also to limit and appoint to or for the woman or women respectively, to or for whom the annual sum or annual sums, or yearly rent-charge or yearly

rents-charge, shall be so appointed as aforesaid, usual powers and remedies for recovering and enforcing payment thereof respectively by distress and entry upon, and perception of the rents and profits of, the hereditaments which shall be so charged with the said annual sum or annual sums, yearly rent-charge or yearly rents-charge; and also to limit and appoint the hereditaments, which shall be so charged, to any person or persons, for any term or terms of years, with or without impeachment of waste, upon such trusts for better securing the due payment of such annual sum or annual sums, or yearly rent-charge or yearly rents-charge, as to the said A. B. shall seem meet; but so, that upon the death of the woman or respective women, for the benefit of whom such term or respective terms shall be so created, and the payment of the rent-charge or respective rents-charge, and the expenses incurred by the non-payment thereof respectively, the term or respective terms, which shall be created for securing such yearly rent-charge or respective rents-charge, or so much of the same term or respective terms, as shall not be disposed of under the trusts to be declared for securing the same yearly rent-charge or respective rents-charge, shall be made to cease and determine.

APPENDIX, No. IV. b.

Proviso enabling Tenants for Life in Remainder to limit Rents-charge, by way of Jointure.

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PROVIDED always, and it is hereby agreed and declared between and by the said parties to these presents, that it shall and may be lawful for each of them the said C. D., E. F., and G. H., either before, or when, by virtue of the limitations hereinbefore contained, he shall be in the possession, or entitled to the receipt of the rents and profits of the hereditaments expressed to be hereby appointed and released, by any deed or deeds, instrument or instruments, in writing, with or without power of revocation and new appointment, to be by him sealed and delivered in the presence of, and attested by, two or more credible witnesses, or by his last will and testament in writing, or any codicil or codicils thereto, to be by him signed and published in the presence of, and attested by, three or more credible witnesses (but subject, and without prejudice, to the uses and estates preceding the use or estate of the person, making such appointment, and to the powers relating to such preceding uses or estates, if any such uses, estates, or powers shall be

then subsisting, or capable of taking effect, or being exercised; and also subject, and without prejudice, to the uses or estates, if any, which shall or may be limited in exercise of the same powers or any of them), to limit or appoint unto, or to the use of, or in trust for, any woman or women, with whom he may intermarry, for the life or respective lives of such woman or women respectively, and for her or their jointure or respective jointures, and in bar, or without being in bar, of her or their dower or respective dowers, and either before or after marriage, any annual sum or yearly rent-charge, or annual sums or yearly rents-charge, not exceeding in the whole for one woman the sum of £ of lawful money of Great Britain, to be yearly issuing out of, and charged and chargeable upon, all or any part of the said hereditaments expressed to be hereby appointed and released, free from taxes, and without any other deduction whatsoever, and to be paid in such manner as to him shall seem meet; and also to limit or appoint to or for the woman or respective women to or for whom such annual sum or yearly-rent charge, annual sums or yearly rents-charge, shall be so appointed, usual powers and remedies for recovering and compelling payment thereof by distress and entry, and perception of rents and profits; and also to limit and appoint the same hereditaments unto any person or persons for any term or

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terms of years, either with or without impeachment of waste, upon such trusts, for better securing the due payment of such annual sum or annual sums, or yearly rent-charge or yearly rents-charge, as to the person, for the time being making such appointment, shall seem meet ; but so that, upon the death of the woman or respective women for the benefit of whom such term or respective terms shall be so created, and the payment of the rent-charge or respective rents-charge, and the expenses incurred by the non-payment thereof respectively, the term or respective terms, which shall be created for securing such yearly rent-charge or respective rents-charge, or so much of the said term or respective terms, as shall not be disposed of under the trusts to be declared for securing the same yearly rent-charge or respective rents-charge, shall be made to cease and determine : but it is hereby agreed and declared between and by the said parties to these presents, that if they the said B. D., E. F., and G. H., or any of them, at any time or times hereafter, before they respectively shall, by virtue of, or under, the limitations hereinbefore contained, be in the actual possession, or receipt of the rents and profits, of the hereditaments expressed to be hereby appointed and released, shall, in exercise of the powers hereinbefore reserved to them respectively, limit and appoint to, or in trust for, any woman or women whom he or

they shall or may marry, any annual sum or annual sums, or yearly rent-charge or yearly rents-charge, by way of jointure as aforesaid, then and in every such case, no annual sum or annual sums, yearly rent-charge or yearly rents-charge, which shall be so limited or appointed as aforesaid, shall take effect in possession, or charge the hereditaments expressed or intended to be charged with the same respectively, or be payable, unless and until the person limiting or appointing the same as aforesaid, shall under, or by virtue of, the limitations aforesaid, or some of them, become entitled to the possession or receipt of the rents and profits of the same hereditaments, or if he shall die previously thereto, then unless and until he would, in consequence of the determination of the uses or estates preceding the use or estate hereby limited to him, have become, if living, entitled to the possession or receipt of the rents and profits of the same hereditaments, at any time during the life of his wife, to or for whom such annual sum or yearly rent-charge shall be so limited as aforesaid.

Provided also, and it is hereby agreed and declared between and by the said parties to these presents, that the said hereditaments shall not, under or by virtue of these presents, or the powers hereinbefore contained, or any of them (and including the said yearly rent-

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charge of £ , provided for the said I. K. as aforesaid), be at any one time subject or liable to the payment of any annual sum or annual sums, or yearly rent-charge or yearly rents-charge by way of jointure, exceeding in the whole the annual sum of £ ; so that if, by virtue or in exercise of the aforesaid powers of jointuring, or any of them, the said hereditaments, or any part or parts thereof, would, in case this present proviso had not been inserted, be charged with a greater annual sum for jointures in the whole, than the said sum of £ , the payment of the sum occasioning such excess, or such part thereof as shall occasion the same, shall, during the time of such excess, be suspended.

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Proviso enabling a Tenant for Life, in Possession, to charge for younger Children's Portions.

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PROVIDED always, and it is hereby agreed and declared between and by the said parties hereto, that it shall and may be lawful to and for the said A. B., at any time or times during his life, by any deed or deeds, instrument or instruments in writing, with or without power of revocation and new appointment, to be by him sealed and delivered in the pre-

sence of, and to be attested by, two or more credible witnesses, or by his last will and testament in writing, or any codicil or codicils thereto, to be by him signed and published in the presence of, and attested by, three or more credible witnesses (but subject, and without prejudice, to the said yearly rent-charge of £ and the powers and remedies hereinbefore limited for enforcing payment thereof, and to the said term of 99 years, under the trusts aforesaid, for better securing the same yearly rent-charge, and also subject, and without prejudice, to any other jointure, which may be limited or created by the said A. B., in exercise of the power hereinbefore reserved to him for that purpose), to subject and charge all or any part of the said hereditaments expressed to be hereby released, to and with the payment of any sum or sums of money, not exceeding in the whole the sum of £ of lawful money of Great Britain, for the portion or portions of all, and every, or any of the children of the said A. B., lawfully begotten or to be begotten (other than, or not being any of them an eldest or only son for the time being entitled to the said hereditaments expressed to be hereby released for an estate tail in possession, or in remainder expectant upon the decease of the said A. B.), with interest for the same at any rate, not exceeding 5*l.* for every 100*l.* by the year, to be paid to, or shared and di-

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vided between or amongst all, and every, or any one or more of the children of the said A. B. (other than, or not being any of them an eldest or only son for the time being entitled as aforesaid), at such age or respective ages, days, or times, and in such parts, shares, and proportions, and with such conditions, restrictions, and limitations over for the benefit of some or one of the same children (other than, or not being any of them an eldest or only son for the time being entitled as aforesaid), and in such manner, as he the said A. B., by any deed or deeds, instrument or instruments in writing, with or without power of revocation and new appointment, to be by him sealed and delivered in the presence of, and attested by, two or more credible witnesses, or by his last will and testament in writing, or any codicil or codicils thereto, to be by him signed and published in the presence of, and attested by, three or more credible witnesses, shall direct or appoint; and that for the purpose of raising such portion or portions, with interest for the same, it shall and may be lawful for the said A. B. by the same or any other deed or deeds, instrument or instruments in writing, so sealed and delivered and attested as aforesaid, or by such his last will and testament in writing, or any codicil or codicils thereto, so signed, published, and attested as aforesaid (but subject, and without prejudice, as hereinbefore is

mentioned), to limit or appoint all or any part of the hereditaments, which shall be so charged as hereinbefore is mentioned, with the appurtenances, to any person or persons, for any term or terms of years, with or without impeachment of waste, in trust, by way of mortgage, to raise the money so to be charged; but so that it be declared by the deed, will, or instrument, creating such term or terms of years, that when the trusts, which shall be declared concerning the same term or terms, shall have been fully performed or satisfied, or shall have become unnecessary or incapable of being performed, and the costs, charges, and expenses, if any, of the trustee or trustees of the same term or terms in and about the execution and performance of the trusts thereof, shall be paid or satisfied, the same term or terms, or so much thereof, as shall not be disposed of under the trusts thereof, shall cease and determine.

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APPENDIX, No. V. b.

Proviso enabling Tenants for Life in Remainder to charge for younger Children's Portions.

PROVIDED always, and it is hereby further agreed and declared between and by the said parties to these presents, that it shall and may be lawful to and for each of them the

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said C. D., E. F., and G. H., either before or when, and as, by virtue of or under the limitations hereinbefore contained, he shall be in the actual possession, or receipt of the rents and profits of the said hereditaments, expressed to be hereby released, by any deed or deeds, instrument or instruments in writing, with or without power of revocation and new appointment, to be by him sealed and delivered in the presence of, and attested by, two or more credible witnesses, or by his last will and testament in writing, or any codicil or codicils thereto, to be by him signed and published in the presence of, and attested by, three or more credible witnesses (but subject, and without prejudice, to the uses and estates preceding the use or estate hereby limited to him, and to the powers relating to such preceding uses or estates, if any such uses, estates, or powers shall be then subsisting, or capable of taking effect and being exercised; and also subject and without prejudice to the uses or estates to be limited in execution of the same powers or any of them, and subject and without prejudice to any jointure limited or created, or which shall be limited and created by him in exercise of the power for that purpose hereinbefore reserved to him), to subject and charge all or any part of the said hereditaments expressed to be hereby released, to and with the payment of any sum or sums of money for the portion or portions of the

child or children of the person making such appointment, other than, or not being any of them an eldest or only son for the time being entitled to the said hereditaments, for an estate in tail male in possession, or in remainder expectant on the decease of his parent, not exceeding in the whole the sum or sums of money hereinafter mentioned, (that is to say;) If but one such child, other than, or not being an eldest or only son for the time being entitled as aforesaid, not exceeding the sum of £ for his or her portion; if two or three such children, and no more, other than, or not being any of them an eldest or only son for the time being entitled as aforesaid, not exceeding the sum of £ for their portions; and if more than three such children, other than, or not being any of them an eldest or only son for the time being entitled as aforesaid, not exceeding the sum of £ for their portions; and with interest for the same sums of money respectively, at any rate not exceeding 5*l.* for every 100*l.* by the year; and such sum or sums of money to be paid to such child, or if more than one such child, then to be paid to, shared and divided between or among, the children respectively for whom the same shall be intended to be provided, at such age or respective ages, days, or times, and if more than one, in such parts, shares, and proportions, and with such conditions, restrictions, and limitations over for the be-

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nefit of some or one of the same children, as the person making such limitation or appointment shall by any deed or deeds, instrument or instruments in writing, with or without power of revocation and new appointment, to be by him sealed and delivered in the presence of, and to be attested by, two or more credible witnesses, or by his last will and testament in writing, or any codicil or codicils thereto, to be by him signed and published in the presence of, and attested by three or more credible witnesses, direct or appoint; but so nevertheless, that if there shall be only one such child of the person making such appointment, who shall live to attain a vested interest in the sum or sums of money so to be charged as aforesaid, such child shall not in any case, by survivorship or otherwise, have or be entitled to more than the sum of £ for his or her portion; and if there shall be two or three such children, and no more, who shall live to attain vested interests in the respective portions so to be charged as aforesaid, such two or three children shall not in any case, by survivorship or otherwise, have, or be entitled to more than the sum of £ for their portions: and that for the purpose of raising such portion or portions and interest for the same respectively, it shall and may be lawful to and for the person making such appointment as lastly hereinbefore is mentioned, by the same, or

any other deed or deeds, instrument or instruments in writing, so sealed, delivered and attested as aforesaid, or by such his last will and testament in writing, or any codicil or codicils thereto, so signed, published, and attested as aforesaid, but subject and without prejudice as aforesaid, to limit or appoint all or any part of the hereditaments which shall be so charged as lastly hereinbefore is mentioned, to any person or persons for any term or terms of years, with or without impeachment of waste, upon trust, by way of mortgage, to raise the money so to be charged; but so that it be declared by the deed, will, or instrument creating such term or terms of years, that when the trusts which shall be declared concerning the same term or terms shall have been fully performed or satisfied, or shall have become unnecessary or incapable of being performed, and the costs, charges, and expenses, if any of the trustee or trustees of the same term or terms in and about the execution and performance of the trusts thereof shall be paid or satisfied, the same term or terms, or so much thereof as shall not be disposed of under the trusts thereof, shall cease and determine: but it is hereby agreed and declared between and by the said parties hereto, that if the said C. D., E. F., and G. H., or any of them, at any time or times hereafter, before they shall respectively by virtue of, or under, the limitations here-

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inbefore contained, be in the actual possession or receipt of the rents and profits of the hereditaments expressed to be hereby released, shall, in exercise of the powers hereinbefore enabling them respectively in that behalf, subject and charge the said hereditaments or any of them, or any part thereof, with the payment of any sum or sums of money for a portion or portions as aforesaid; then, and in every such case, the sum or sums of money so expressed or intended to be charged for a portion or portions, shall not be a lien or a charge upon the hereditaments so expressed, or intended to be charged with the same respectively, or become vested in, or payable to, any person or persons whomsoever, nor carry interest, unless and until the person or persons so charging the same hereditaments with a portion or portions as aforesaid, or some one, or more of his or their issue male, shall under, or by virtue of, the limitations hereinbefore contained, or any of them, become entitled to the actual possession or receipt of the rents and profits of the same hereditaments, any thing hereinbefore contained to the contrary notwithstanding: provided always, nevertheless, and it is hereby agreed and declared between and by the said parties to these presents, that the said hereditaments shall not under, or by virtue of, the powers hereinbefore contained, or any of them, be at any one time subject or liable to

the payment of any sum or sums of money exceeding the principal sum of £ in the whole, for the portions of daughters or younger sons as aforesaid.

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PROVIDED always, and it is hereby declared and agreed, by and between the said parties to these presents, that it shall and may be lawful to and for the said B. B. and C. C. and the survivor of them, and the heirs of such survivor, and they and he are hereby authorized and empowered, at any time or times hereafter, at the request and by the direction of the said E. E. and I. T. during their joint lives, and after the decease of either of them, then at the request and by the direction of him or her surviving, during his or her life (such request and direction to be testified by some writing or writings sealed and delivered by the said E. E. and I. T. or the survivor of them, and to be attested by two or more credible witnesses), to make sale, alien, and dispose of, or to convey in exchange for, or in lieu of, other messuages, lands, or hereditaments, to be situate somewhere in England or Wales, all or any part of the hereditaments hereby granted and released, or intended so to be, with the appurtenances, and the inheritance thereof in fee-

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simple, to any person or persons whomsoever, either together or in parcels, for such price or prices in money, or for such equivalent or recompense in messuages, lands, or hereditaments, as to them the said B. B. and C. C. or the survivor of them, or his heirs, shall seem reasonable; and that for the intents and purposes aforesaid, or any of them, it shall and may be lawful to and for the said B. B. and C. C. and the survivor of them, and the heirs of such survivor, at such request, and with such direction, and so testified as aforesaid, by any deed or deeds, writing or writings, to be by them the said B. B. and C. C. or the survivor of them, or his heirs, sealed and delivered in the presence of, and attested by, two or more credible witnesses, to revoke, determine, and make void all and every the uses, estates, trusts, limitations, powers, provisoes, and agreements, hereinbefore limited, expressed, declared, and contained, of and concerning the hereditaments so to be sold or exchanged, or any part thereof; and by the same, or any other deed or deeds, writing or writings, to be by him or them sealed and delivered, and attested as aforesaid, to limit and appoint, direct and declare, such use or uses, estate or estates, trust or trusts, of the hereditaments, the uses whereof shall be so revoked, which it shall be thought necessary or expedient to limit, declare, or appoint, in order to effect such sale, exchange, or

disposition as aforesaid ; and that upon any such exchange as aforesaid, it shall and may be lawful for the said B. B. and C. C. or the survivor of them, or his heirs, to receive or take any sum or sums of money by way of equality of exchange ; and also upon payment of any money to arise by such sale of the said hereditaments, or any part thereof, or any money to be received or taken for, or by way of, equality of exchange, it shall and may be lawful to and for the said B. B. and C. C. or the survivor of them, or his heirs, to give and sign receipts for the money, for which the same shall be so sold, or so to be paid for equality of exchange ; which receipts shall be sufficient discharges to the person or persons paying the same respectively, for the money for which the same shall be so given, or for so much thereof as in such receipts shall be respectively acknowledged or expressed to be received ; and that the person or persons paying the same respectively, and taking such receipt or receipts for the same as aforesaid, shall not afterwards be obliged to see to the application, or be in any wise answerable or accountable for any loss, misapplication, or non-application of such money, or any part thereof. Pro-

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^a It is usual to introduce a clause in this place declaring, that upon sale or exchange, the estates so sold, or exchanged, shall be discharged of the uses of the settlement ; and that the releases shall thence-

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vided nevertheless, and it is hereby also declared and agreed, by and between the said parties hereto, that when all or any part or parcel of the said hereditaments, hereby made saleable as aforesaid, shall be sold in pursuance of these presents for a valuable consideration in money, and also when any sum or sums of money shall be received for equality of exchange in pursuance of the power hereinbefore contained, then they the said B. B. and C. C. or the survivor of them, or his heirs, shall with all convenient speed (with the consent of the said E. E. and I. T. during their joint lives, or of the survivor of them during his or her life, to be testified by writing under their, his, or her hands or hand, and after the decease of such survivor, then with the consent in writing of the person or persons who would, under or by virtue of the limitations hereinbefore contained, or to be contained or referred to in the settlement or conveyance hereinafter directed, or any of them, be for the time being in the actual possession, or entitled to the receipt of the rents and profits of the hereditaments

forth stand seised to the use of the purchaser. But this clause seems to be altogether useless: for the appointment under the power must necessarily discharge the estates of the former uses. Besides, as the uses under the appointment may be limited, so as to provide

for a variety of circumstances, there is an impropriety in declaring, that the releasees in the original settlement shall stand seised to the use of the purchaser, or the person to whom the estate shall be conveyed, and his heirs.

to be purchased as hereinafter is mentioned or directed, in case the same were then actually purchased, if such person or persons be of full age, but if not, then with the consent in writing of the guardian or guardians for the time being of such person or persons respectively) lay out^b and invest all and every

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^b Sometimes the following form is adopted in lieu of that here stated—"lay out and invest the monies to arise by such sale or sales, and to be received for equality of exchange, in the purchase of a clear and indefeasible estate of inheritance in fee-simple, or of lands of a leasehold or copyhold tenure convenient to be held therewith, or with any of the hereditaments hereinbefore expressed to be hereby granted and released (such leasehold hereditaments being held for an unexpired term of not less than 60 years); and moreover that the said B. B. and C. C. or the survivor of them, or the heirs, executors, or administrators of such survivor, do and shall settle and assure, or cause to be settled and assured, as well the messuages, lands, tenements, and hereditaments so to be purchased, as the messuages, lands, tenements, and hereditaments so to be received in exchange as hereinbefore is mentioned, to such

"and the same uses, upon
"and for such and the same
"trusts, intents, and purposes, and with, under, and subject to, such and the same powers, provisions, declarations, and agreements, as are in and by these presents limited, expressed, declared, and contained of and concerning the premises, which shall be so sold or exchanged, or as near thereto as the nature or quality of the lands so to be purchased, and the deaths of parties, and other circumstances, will permit; yet so that if any of the said hereditaments so to be purchased shall be held by lease or leases for years, the same leasehold hereditaments shall not vest absolutely in any son of the said E. E. on the body of the said F. F. to be begotten, who shall take an estate in tail by purchase of and in the said freehold hereditaments, unless such son shall attain the age of 21 years, or shall die under that age, leaving issue of his body living at his de-

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the sum and sums of money, which shall arise by such sale or sales, and be paid for equality of exchange as aforesaid, in the purchase of other messuages, lands, or hereditaments in possession, to be situate, being, or arising somewhere in England or Wales, of a clear and indefeasible estate of inheritance in fee-simple (whereof any part, not exceeding one fourth part in any one purchase, may, if the parties interested shall think fit, be copyhold of inheritance); and as well the hereditaments so to be purchased, as all and every the hereditaments so to be received in exchange as aforesaid, shall thereafter forthwith be settled, conveyed, and assured to, for, and upon, such uses, trusts, intents, and purposes, and with, under and subject to such powers, provisoes, conditions, and agreements, as are in and by these presents limited, expressed, declared, and contained, of and concerning the hereditaments in lieu of which, the hereditaments so to be purchased, or received in exchange, shall be substituted, or as near thereto as the deaths of parties, and other contingencies, or the circumstances of the case, will then permit. Provided always, and it is hereby further declar-

“ cease, or born in due time
“ after; but nevertheless
“ the son so for the time
“ being entitled as afore-
“ said shall, after the death
“ of the said E. E., and
“ during such suspense of

“ absolute vesting as afore-
“ said, be entitled to the
“ rents, issues, and profits
“ of the same leasehold he-
“ reditaments for his own
“ use and benefit, subject
“ as aforesaid.”

ed and agreed by and between the said parties to these presents, that in the mean time and until the money to arise by such sale or sales, or to be received for equality of exchange as aforesaid, shall be laid out and invested in a purchase or purchases in the manner hereinbefore mentioned, it shall and may be lawful to and for the said B. B. and C. C. and the survivor of them, and the heirs of such survivor, by and with the consent and approbation of the said E. E. and I. T. or of the survivor of them, to be testified as last mentioned, and from and after the decease of such survivor, then by and of the proper authority of the said trustees or trustee for the time being, from time to time to place out and invest such sum or sums of money in the public stocks or funds of Great Britain, or at interest upon government or real securities in England or Wales; and from time to time, with such consent and approbation, and so testified as aforesaid, or of their or his own proper authority, as the case shall happen, to alter, vary, sell, transfer, and dispose of such stocks, funds, or securities, and lay out and invest the money arising by such alteration, sale, transfer, or disposition again, upon new or other stocks or funds, or at interest upon government or real securities of the like nature, as often as they shall think proper; and the interest, dividends, and annual proceeds arising from such stocks, funds,

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or securities, shall from time to time go and be paid to such person or persons, and be applied to such uses, intents and purposes, and in such manner as the rents and profits of the hereditaments, to be purchased therewith, would go and be payable, or applicable, in casesuch purchase or purchases were actually made.

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See pages 178 to 192, where the case, upon which the following opinion was given, is stated.

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We have considered this case with the opinions, which have been given thereon.

We think, that the power of sale and exchange was not destroyed by the recoveries suffered in 1811.

It is unnecessary to consider the distinction, which has been taken between powers collateral or in gross, and powers simply collateral; as the ground upon which Mr. ——— thinks, that the recovery destroys the power, viz. “that the power is a contingent use, “which is collateral to the estate tail, and “if exercised would over-reach it,” would equally apply to powers of both descriptions. We know of no authority for this position.

The rule, as established by the cases, we conceive to be, that a recovery by tenant in tail destroys conditional limitations, which would determine the estate tail before a failure of issue, as well as remainders expectant upon the natural determination of the estate. But we think, that the power of sale and exchange is not in the nature of a conditional limitation, or a contingent use defeating or determining an estate tail. The execution of the power, is the limitation of a use under, and by the effect of, the instrument, by which the power was reserved, and within the compass of an estate prior to the estate tail, in substitution of all the uses of the settlement. It is in the nature of a condition, that runs with the land, and not a collateral condition or limitation taking effect, when the event happens, upon which the estate tail is made to determine. The execution of the power, although it over-reaches the estate tail, cannot be said to determine it; inasmuch, as the uses created are prior in limitation to the commencement of the estate tail; and we think, that, in order for the recovery to bar, it is necessary, that the use, to arise under the power, should operate, strictly speaking, as a remainder, upon the particular estate. It is impossible to contend, that all contingent uses over-reaching an estate tail ~~are~~^{are} barable by a recovery; as many cases will suggest themselves, where the contrary is obvious;

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such as contingent remainders to the unborn children of a prior tenant for life. The distinction, which we have noticed, between a condition, and what is commonly termed a conditional limitation, is commented upon in some MS. observations of the late Mr. Sergeant Hill, in the margin of the case of *Page v. Hayward* in the second volume of his *Salkeld's Reports*; and they are so applicable to the present question, and appear to us so well founded, that we annex a copy of them to our opinion.

The distinction in the case of *Page v. Hayward*, is also adverted to in Mr. Sugden's *Treatise on Powers*, p. 78. second edition, where it is suggested, that the estates created under the power may be considered a *charge* upon the estate tail; which seems another expression for the construction we have adopted.

Mr. Sugden then states several cases, in which, under a contrary construction, every purpose of the power might be defeated: and many others might be added.

If we are mistaken in considering it clear, that the power is not destroyed by the recovery, there can be no doubt, that a very great number of titles will be open to the objection; as the doctrine, that powers annexed to the estate of a tenant for life may be kept

alive by his reserving a reversion, in conveying to the tenant to the *præcipe*, was an established one in the time of Mr. Booth, and it has since been acted upon by the most eminent conveyancers. We believe we might say, that the practice has been universal.

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We have seen MS. precedents of drafts settled by Mr. Booth of the deeds executed for barring an entail of estates, in which the marchioness G., then the wife of the earl of H., was tenant for life, with remainder to her first and other sons successively in tail, with remainder to her first and other daughters successively in tail; and for resettling the estate on the marriage of lady Annabella G., the eldest daughter of the earl of H., by the marchioness, the deed making the tenant to the *præcipe*, contains the following recital; “And whereas there is not any issue male of “the said J. marchioness G., and therefore “the said P. earl of H., J. marchioness G., “and the said lady Annabella G., who has “attained her age of twenty-one years as “hereinbefore is mentioned, are desirous of “suffering common recoveries of the said “manors, &c. and of barring the estate tail, so “vested in the said lady Annabella G., and all “the remainders over, and the reversion and “remainder in fee, which was so limited to “the right heirs of the said Henry late duke “of K.; but without prejudicing or disturb-

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“ing any of the precedent uses, estates, or
 “charges in and by the said indenture of the
 “26th June 1736, and the said will, &c. or
 “any of them, expressly or by reference,
 “limited, created, or declared, prior to or
 “before the said remainder or limitation, to
 “the first daughter of the body of the said
 “J. marchioness G. by the said P. earl of H.
 “begotten, or prior to or before the said re-
 “mainder or limitation to the said lady
 “Annabella G., and the heirs of her body
 “lawfully issuing, and without prejudicing
 “or disturbing any of the powers or pri-
 “vileges to the said precedent uses or
 “estates annexed or belonging; all which
 “precedent uses, estates, powers, and privi-
 “leges, are intended to be corroborated and
 “confirmed by the common recoveries so in-
 “tended to be suffered.” And by the ope-
 “rative part of the deed, “in order to bar, &c.
 “all estates tail, &c., but without prejudi-
 “cing or disturbing the said uses, estates, and
 “charges, prior, &c. or any of the powers or
 “privileges to the precedent uses or estates,
 “or any of them, annexed or belonging, and
 “to the intent, that the said manors, &c.
 “but subject and without prejudice to the
 “uses, powers, &c. [using the same words as
 “before], may be limited to the uses, &c.
 “after mentioned;” the earl and mar-
 “chioness, and lady A., join in conveying by
 lease and release to the tenant to the præcipe,

during the joint lives of himself and the marchioness; and the recovery is directed to enure,—“in the first place, for corroborating, “strengthening, and confirming the said uses, “estates, &c. precedent to, or before, the limitation to the first daughter of the body of the “said marchioness, and the heirs of her body “issuing, and for corroborating, strengthening and confirming the several *powers* and “*privileges* to the same precedent uses, “estates, &c. belonging or annexed; and “after the determination of the said several “precedent uses, &c., and subject to the said “preceding uses, &c., to such uses as the “said earl and marchioness and lady Annabella should appoint, and in default of “appointment to the uses therein mentioned.”

By a deed of appointment executed after the recovery was suffered, the estates were resettled, pursuant to articles on the marriage of lady Annabella with lord P. By this deed, after reciting the deed to make the tenant to the præcipe, and the marriage articles, the earl and marchioness, and lady Annabella, then lady P., “in exercise of their power, “appoint that all the said manors, &c. shall, “from and after the decease of the said marchioness, and after failure of issue male of “her body (but nevertheless, without prejudicing or disturbing any of the *powers*

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“or *privileges* to the said precedent uses or
“estates annexed belonging) remain and
“continue to the uses therein mentioned.”

We have given a full statement of the above precedents, on account of the great authority of Mr. Booth on all questions in conveyancing; and we must observe, that the principles on which these deeds were grounded, seem to have been adopted as a kind of text law by modern writers. They are stated and commented upon by Mr. Butler, in his notes to Co. Littleton, 203. b. He observes, “This continues the old reversion “in the grantor or bargainor, and preserves “the powers relating to his original estate.” Mr. Cruise, in his Digest, 4. vol. p. 335. gives the same precept, as to the mode of suffering recoveries, “in order to preserve the powers “of the tenant for life, by leaving the reversion in him.” Mr. Preston also, in his Treatise on Conveyancing, 1. 108. recommends that the conveyance to the tenant to the præcipe should be confined to the joint lives of the party and tenant, so as to leave a reversion in the owner of the particular estate. “This mode of limitation,” he says, “will not only guard against this merger of “the estate of freehold, but will, in *the most* “*effectual manner*, guard against the destruction of all powers, &c., since they will re-

“ main annexed to the reversion.” The practice is also noticed by Mr. Sugden in his *Treatise on Powers*, 55. second edition : “ So where he (the tenant for life) joins in a common recovery, the *universal practice* is, to convey only during the joint lives of himself and the tenant to the præcipe : and it is also customary in these cases to insert an express declaration, that the conveyance shall not affect, but, on the contrary, be subservient to, the power.” And, after noticing that these precautions apply to powers in gross, as well as to powers appendant, he adds, “ And, as the grantee takes the estate subject to the power, no fraud is committed on him ; and the power, therefore, may, it should seem, be executed in the same manner, as if the donee had not parted with any portion of his estate.”

We refer to Mr. Booth and the writers we have named, in order to show, what infinite danger would happen to titles, if the doctrine and practice so sanctioned should now be considered erroneous, and that it is not on slight grounds, that it ought to be impugned. We are not aware of any recent decision, which has altered the law on the subject ; and we must say, that we entertain no doubt on the point.

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We are also of opinion, that the deed of re-settlement did not operate as an extinguishment of the power.

The principal objection is, that the trustees are made to convey the legal estate vested in them. In answer to this, it is to be observed, that the conveyance was by lease and release, and that the use was relimited to the trustees for the same estate; so that they were in of the old use; and consequently the power could not be affected by their conveyance. We consider this so clear, as not to require an authority. Yet we cannot forbear observing, that Mr. Sugden, in his *Treatise on Powers*, 59., has suggested a similar mode of removing an objection, which it appears had been made to a title before him. His words are, “ But in order to obviate all difficulty, it was recommended, that A. should appoint the estate to herself for life. She would then be in of her old use, and might well execute her power. It would be the mere case of a conveyance of the life estate, by an innocent conveyance to the releasee, to the use of herself for life. The use she would take under the conveyance, would, in no respect, be different from the use, which was before vested in her, and the express limitation of the use would not render it a new one.”

If this were otherwise, still we think, that the power was not extinguished, on the principle, that although appendant, with reference to the estate of the trustees, it is in gross or collateral, so far as concerns the other uses of the settlement. The case of *Slater v. Edwards*, in *Hardress*, is a direct authority, that notwithstanding an alienation of the whole estate of the donee of the power, by an innocent conveyance, the power may be exercised, so as to overreach estates, as to which it is collateral, although it will have no effect to the extent of the estate conveyed by the donee. In the cases, where an alienation by the donee of the power of his whole estate by an innocent conveyance, has been held to destroy or extinguish the power, the nature of the power, or of the interest conveyed, has been such, as to render it impossible, that the power should afterwards be exercised without defeating the parties' own conveyance; as a power for tenant for life to grant leases in possession, where no leases could be granted, without their commencing during the life of the donee; or a limitation to such uses as A. shall appoint, and, in default of appointment to A. and his heirs, where the whole fee passes by the conveyance.

It does not appear to us, that any inference arises from the insertion in the settlement of a new power of sale and exchange,

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that the old one was intended to be abandoned. The new power may have been intended to operate, whenever, by the determination of the preceding estates, under the original settlement or otherwise, there should be no necessity to resort to the old power. But we do not consider it necessary to reason upon inference of intention, in a case where express words are used, denoting that the uses created by the new settlement, are to be subject to the powers in the original settlement, and where the objects proposed could not otherwise be effected. With respect to the objection, that according to the construction contended for, the conveyance was to be subject to the very estates, which were to be conveyed by it; it is sufficient to say, that as to these estates no conveyance was intended, the assurance being meant only by way of corroboration, as the deed expresses.

We recommend, that the points at issue should be tried in an action for the deposit.

(Signed) F. W. SANDERS.

LEWIS DUVAL.

Lincoln's Inn, 11th April 1816.

MSS. note of Mr. Sergeant Hill, on the case of Page v. Hayward.

“ It is contrary to every principle of law
“ and justice, that a recovery suffered by
“ tenant in tail should discharge the estate

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“ tail of any condition, or conditional limitation, to which the estate tail was subject; but it is clear, that if there be a tenant in tail, with remainder over on a contingency, a recovery by tenant in tail will bar the contingent remainder; but the recoveror comes in under the tenant in tail, and subject to all charges, to which the estate tail was subject; and there is no colour for the opinion of Hale, as reported in 1st Mod. 111, that a recovery by tenant in tail will destroy any condition, to which the estate tail was subject. Yet that mistake is followed here by Holt, and in the 2d of Atk. 591, by lord Hardwicke. What is said in 1 Mod. 111, that a recovery by tenant in tail shall bear collateral conditions though annexed to the estate tail, as they are in the cases there put, was extra-judicial; for as observed 1 Mod. 110, the question there arose about a charge subsequent to the estate tail; and lord Hale’s opinion in page 111 is contrary to his reasoning in page 109.

“ N. B. Since the above was written, it seems *clear on further consideration*^a, that where an estate is devised to one in fee simple, upon condition, and in case the

^a These words are interlined in the Sergeant’s own hand, and probably were added some time after the note was written.

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“ condition be not performed, then to an-
“ other; this, if within due bounds, will be
“ good as an executory devise, and therefore
“ not barable by recovery; because no ex-
“ ecutory devise can be barred by recovery
“ (at least not unless the person to whom the
“ executory devise is made is vouched in the
“ recovery); yet if in such case, the first de-
“ vise be *not a fee-simple*, but a *fee-tail*, then
“ the devise over will operate, not by way of
“ executory devise, but as a contingent re-
“ mainder; and consequently a recovery suf-
“ fered by tenant in tail before the condition,
“ or contingency, happens on which the re-
“ mainder is to take effect, must extinguish
“ it, because a remainder cannot, though an
“ executory devise may, and always does,
“ subsist without a particular estate to sup-
“ port it; but where lands are devised in tail
“ on condition, and if the condition be
“ broken, then to B.; this, though called a
“ condition, is by reason of the devise over
“ a limitation, or, as it is frequently called, a
“ conditional limitation, and the devise over
“ being limited after a particular estate (viz.)
“ an estate tail which is capable of support-
“ ing it, as a contingent remainder, it there-
“ fore operates as a contingent remainder,
“ and therefore a recovery suffered (before
“ breach of condition) by the tenant in tail
“ must destroy the contingent remainder by
“ destroying the particular estate, which sup-

“ ported it before the contingency happened ;
 “ that is, before the remainder vested ; for it
 “ is a clear rule, that every remainder must
 “ vest during the particular estate, or *eo*
 “ *instante* that it determines, or otherwise it
 “ can never vest at all.”

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Power to appoint new Trustees.

WHEN new trustees are appointed under a power in the place of deceased or retiring trustees, with the single view of exercising powers of sale, exchange, or partition, there can be no doubt, that by the mere effect of the appointment, the new trustees may be qualified to exercise such powers. But it is usual in all settlements to provide upon each nomination, that every legal interest or estate vested in the deceased or retiring trustees, should be conveyed in such manner, that it may vest in the newly appointed trustees: for in the generality of settlements terms of years are created, and estates are vested in trustees to preserve contingent remainders, or estates for other purposes may be vested in the trustees, who are to exercise the powers of sale, exchange, or partition, which it would be proper to have vested in the new trustees. Powers therefore, of this kind, pro-

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vide, that when, and so often, as any new trustee or trustees shall be nominated and appointed under the power, all the trust estate and premises, the trustee or trustees of which shall die, desire to be discharged, or refuse or become incapable to act, shall be thereupon conveyed, transferred, and assured in such manner, that the same shall be effectually vested in the newly appointed trustees to, for, and upon, the same uses, trusts, and purposes, and under the same powers, as were before limited by the settlement; and hence where the deceased or retiring trustees, to whom powers of exchange, sale, or partition have been reserved, are also releasees, or grantees to uses, it has been argued, although I think erroneously, that to enable the newly appointed trustees to exercise powers of sale, exchange, or partition, two circumstances are necessary; first, that the new trustees should be duly appointed; and secondly, that the trust estates should be conveyed to them and their heirs to the uses of the settlement, so as to give them a seisin to uses. In order to obviate the force of this argument, if it has any, the provisions noticed in the following form of a power may be adopted:

Provided always, and it is hereby agreed and declared, that in case the trustees in and by these presents nominated and appointed

or any of them, or any succeeding, or other trustees or trustee of said trust estate and premises, to be nominated as hereinafter mentioned, or their, or any of their heirs, executors, or administrators, shall happen to die, or be desirous to be discharged of and from, or refuse or become incapable to act in, the trusts or powers hereinbefore expressed, declared, and contained, before the same trusts and powers shall have been fully performed, exercised, or satisfied, then and so often as the same shall happen, it shall and may be lawful for the said A. B. and C. D. during their joint lives, and after the decease of either of them, to and for the survivor of them, during his or her life, and after the decease of such survivor, then to and for the surviving, or continuing, or other trustee or trustees of the premises, the trustee or trustees of which shall so die, desire to be discharged, or refuse, or become incapable to act as aforesaid, by any deed or writing under their, his, or her hands and seals, or hand and seal, to nominate, substitute, and appoint any other person or persons to be a trustee or trustees in the place and stead of such trustees or trustee so dying, desiring to be discharged, or refusing, or becoming incapable to act as aforesaid; and that when and so often as any such new trustees or trustee shall be nominated and appointed as aforesaid, all the said trust estate and premises, the trustee or trustees

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whereof shall so die, desire to be discharged, or refuse, or become incapable to act as aforesaid, shall be thereupon with all convenient speed conveyed, transferred, assigned, and assured respectively (according to the nature and tenure thereof) in such sort and manner, and so that the same shall and may be legally and effectually vested in the newly appointed trustee or trustees jointly with such of the former trustees, as shall be willing and capable to act; or in case there shall be no continuing former trustee, then in such newly appointed trustee or trustees only; to, for, and upon the uses, trusts, intents, and purposes hereinbefore limited, expressed, declared, and contained of and concerning the same; *and that the new trustee or trustees, who shall be appointed in the room or stead of the said E. P. and G. H. or either of them as aforesaid, either alone or jointly with such of them the said E. P. and G. H. as shall continue to act, shall and may, either before or after any such conveyance or assurance as aforesaid, exercise all or any of the powers or authorities hereinbefore reserved or given to the said E. P. and G. H. and the survivor of them, and the heirs of such survivor as aforesaid^a;*

^a Instead of the words in italicks, the following clause may be inserted:

And that to enable any such new trustee or trustees to exercise any of the powers

aforesaid, relating to the estates hereinbefore limited in strict settlement, it shall not be necessary to invest him or them with such seisin or possibility of seisin to

and that every such new trustee shall and may in all things, and in all respects, act and assist in the management, carrying on, and executing of the trusts, to which he

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uses of and in such estates, or any of them, as may, or shall at any time, be vested, or have been vested, in the trustee or trustees, in whose room such new trustee or trustees shall be appointed as aforesaid.

Or, in lieu of the above, the following form may be adopted.

AND that in order, that such hereditaments may be legally and effectually conveyed to, and vested in, such new trustee or trustees jointly with such former trustees or trustee, or in such new trustees or trustee only as occasion shall require, it shall be lawful for the person or persons nominating, substituting, or appointing such new trustee or trustees, under, and by virtue of the power and authority hereinbefore for that purpose contained, by any deed or deeds, instrument or instruments, in writing, to be by him or them sealed and delivered in the presence of, and attested by, two or more credible witnesses to revoke, determine, and make void the uses, trusts, powers, and agreements, in and by these presents limited, created, declared, and expressed, of and concerning the heredita-

ments hereinbefore limited or intended to be limited in strict settlement, or any of them, or any part thereof, and by the same or any other deed or deeds, instrument or instruments, in writing, to be by him or them sealed, delivered, and attested as aforesaid, to limit, declare, direct, or appoint any other use or uses, estate or estates, trust or trusts, of or concerning the hereditaments, or any of them, or any part or parts thereof, which it shall be thought necessary or expedient, to limit, declare, direct, or appoint, for the purpose of conveying or vesting the same premises to or in such new trustee or trustees jointly or solely as occasion may require.

If the latter form be adopted, two instruments will be necessary to exercise the power; first, a deed appointing the new trustee, and revoking the uses of the settlement, and appointing the settled estate to A. B. and his heirs, to the intent, that he should reconvey the same to the old and new trustees, and their heirs, to the subsisting uses of the settlement; and secondly, a reconveyance accordingly by A. B.

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shall be so appointed, as fully and effectually, and with the same power and powers, authority and authorities, as if such new trustee had been originally, by these presents, nominated and appointed, and as the said trustees of the same trust estates and premises named in these presents are, or would be, enabled to do, or might, or could have done, under, or by virtue of the same, or any clause, power, or proviso hereinbefore contained or implied; or otherwise, as if such original trustees had been then living and continuing to act under, or in execution of the trusts, powers, and authorities reposed in, or reserved to, them in and by these presents.

END OF VOL. I.

AN
ESSAY
ON
USES AND TRUSTS,
AND ON THE
Nature and Operation
OF
CONVEYANCES AT COMMON LAW,
AND OF THOSE, WHICH DERIVE THEIR EFFECT FROM
THE STATUTE OF USES.

FOURTH EDITION,
REVISED, CORRECTED, AND CONSIDERABLY ENLARGED.

BY FRANCIS WILLIAMS SANDERS, ESQ.
OF LINCOLN'S INN, BARRISTER.

IN TWO VOLUMES.

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FEOFFMENT.

(1.) I MAY describe a feoffment to be a conveyance of *corporeal* hereditaments from one person to another by delivery of the possession upon, or within view of, the hereditaments so conveyed.

Definition of
feoffment.

The ceremony used in such act of delivery is called *livery of seisin*.

(2.) As feoffments are the most simple, so they are the most ancient, species of conveyance. The original method of acquiring property in lands was by occupancy; and the first mode of transferring it from one man to another was by the public and solemn delivery of the possession. Sir Edward Coke has observed^a, that when the kinsmen of Elimelech gave unto Boas the parcel of land, that was Elimelech's, he took off his shoe, and gave it unto Boas in the name of seisin

The antiquity
of feoffments.

^a Co. Litt. 49. b.

The antiquity
of feoffments.

of the land (after the manner of Israel), in the presence, and with the testimony, of many witnesses; and that when Ephron enfeoffed Abraham of the field of Machpela, he said to him, *Agrum trado tibi*, &c.; I deliver this field to thee.

This mode of conveyance, by actual delivery of the land, derives its present name of *feoffment* from the introduction of the feudal system in England; for it is the *donatio feudi* according to its acceptation with us^b. At what period, however, whether before or after the Norman conquest, we are to date the establishment of the feudal tenures in this country, has been a point so much disputed, that it is impossible to form a decided opinion upon it without differing from some of the most respectable authorities^c.

^b Co. Litt. 9. a

^c It is worthy of notice, that the term *feodum*, or *feof*, was not always applied to lands. Thus, in a convention made between Henry the First, and Robert earl of Flanders, dated at Dover the 16th of the calends of June 1101, wherein the earl engages to assist Henry, *ad tenendum et defendendum regnum Angliæ, contra omnes homines, qui vivere, et mori possint*, the king of England, on his part, engages

to pay the earl *unoquoque anno 400 marcas argenti* in feodo. Vide Acta Regia, 3. in notis. However, when we speak of a *feoffment*, we must understand the word as applying to a conveyance of *lands* only. For Briton on this head tells us, that “*Don* est un nosme general, plus que n’est *feoffment*; car *Don* est general a toutes choses moebles, et nient moebles, et *feoffment* est riens farsque de soil.” Wing. Brit. Ca. 34.

(3.) The conveyance by feoffment was introduced into this country, when men were scarcely acquainted with the use of letters; it was necessary, therefore, that it should be on or near to the land, in order that the tenants of the manor, who in those days determined in the lord's court all controversies relating to such translation, might be witnesses to the livery. After the conquest, charters of feoffment began to be in use; at first, however, they were drawn up in no regular form; nor was there any uniformity in the style till the reign of Edward I. Still the charter of feoffment was by no means a necessary part of the conveyance^d; though we may conclude, that men found by experience, that it was the most sure way to authenticate and secure the titles to their property. At all times, a livery of seisin, made in pursuance of a charter, was less liable to disputes concerning its validity, than that made on a conveyance without a deed. The conveyance of feoffment in *writing* served, as Bracton observes^e, *ad perpetuam memoriam, propter brevem hominum vitam, et ut facilius probari possit donatio*. The legislature has, however, rendered a charter of feoffment as necessary as the livery of seisin. For by the statute of frauds,^f there can be no conveyance of

Introduction of
the charter of
feoffment.

^d 2 Bac. Ab. 463.

^f 29 Car. 2. c. 3.

^e Bract. lib. 2. fol. 33. b.

Introduction of
the charter of
feoffment. lands or hereditaments, for more than three
years, without writing.

Of the two
kinds of livery
of seisin.

(4.) To every feoffment, whether made to create an estate in fee-simple, fee-tail, or for life, livery of seisin is indispensably necessary^g; and it properly denotes the willingness of the feoffor to part with, and the feoffee to receive the estate, of which the feoffment is made^h. This livery of seisin is divided into livery *in deed*, and livery *within view*, or *in law*.

Livery in deed.

(4.) 1. Livery *in deed* is performed by the feoffor's coming upon the land, and delivering to the feoffee, a clod, branch, or turf, there growing, "In name of seisin of all the
"lands and tenements contained in this
"deedⁱ:" or livery in deed may be given by the feoffor's delivering the *charter* upon the land, in the name of livery of seisin of all the lands comprised in the deed^k; or by words only, without any act of delivery, as if the feoffor, being upon the land, says to the feoffee, "Enter you into this land, and take
"seisin of it in the name of all the land contained in this deed^l." But in all cases,

^g Shep. T. 206.

Ab. 7. pl. 10.

^h West's Symb. part 1.
s. 251.

^l 6 Co. 26. b. 9 Co.
137. b. Sed contra, Cro.

ⁱ 2 Black. Com. 315.

Jac. 80. pl. 2.

^k 9 Co. 138. a. 2 Roll.

where the delivery of the charter is to serve Livery in deed. as livery of seisin, it is necessary, that the charter should be delivered in the *name of seisin*, &c. &c. ; for otherwise it will serve as a delivery to perfect the *deed*, and not as *livery of seisin*^m. If the livery of seisin be of a house, the feoffor must take the ring, or latch of the door (the house being quite empty), and deliver it in the form above mentioned; and then the feoffee must enter alone, shut the door, then open it, and let in the othersⁿ.

In all cases of livery of seisin by deed, a Livery by attorney. man may either *give* or *receive* it by attorney^o. The power to *give* or *receive* the livery must be by *deed*, in order that it may appear, whether it be pursuant to the authority^p. If the feoffment be by *deed poll*, the letter of attorney may be contained in it; but not so, if it be by deed *indented*; unless the attorney be a party to such indenture^q. The power of attorney must be executed both in the lifetime of the feoffor, and the feoffee^r. It is said, that when the king made a feoffment, he used to issue his writ to empower his sheriff, or other person, to deliver seisin: in

^m Co. Litt. 48. a.

ⁿ 2 Black. 315.

^o Co. Litt. 52. a. 2 Roll. Ab. 8.

^p 2 Roll. Ab. 8. pl. 4, 5.

^q Co. Litt. 52. b. Sed contra, Cro. Eliz. 905. 2 Roll. Ab. 8. pl. 12. Shep. T. 217.

^r Co. Litt. 52. b.

Livery by attorney.

time other great men did the same; and this circumstance gave rise to powers of attorney^a.

Livery within view.

(4.) 2. The livery *within view*, or in *law*, is made when the feoffor is not actually upon the land or in the house, but being in sight of it, says to the feoffee^t, “I give you yonder house, enter and take possession;” or by delivering a charter of feoffment within view, says, “I will, that you have the lands that you see there, which are comprised in this deed, according to the purport of it^u.” There is this inconvenience attending the above mode of delivery, that no freehold can be vested before an actual entry made by the feoffee^w. Therefore, in case of the death either of feoffor or feoffee before entry, the livery is void. It may possibly happen, that the feoffee is prevented from making an actual entry by bodily fear; yet still he may make his *claim*, as near to the land as he dares to venture; which will be sufficient to vest the possession in him, and render the livery complete^x. It must be observed, that

^a Butl. note 2. Co. Litt. 271. b. See further as to livery by attorney, Co. Litt. 52. b. note 2. Com. Dig. Feof. B. 3 Ba. Ab. Feof. E. Pollexf. 47. 2 Bac. Ab. 485.

^u 2 Roll. Ab. 7. pl. 2.

^w Co. Litt. 266. b. Shep. Touch. 217.

^x 2 Roll. Ab. 3. (J.) Co. Litt. 48. b.

no livery within view can be made by attorney^y. Livery within view.

(5.) If a feoffment be made of lands in several towns in one county, and seisin be given of parcel of the lands in one town, in the name of the lands in that and in the other towns, all these lands of the feoffor will pass^z. But if a feoffment be made of lands in different counties, livery in deed must be made in each of the counties^a: yet livery within view may be made of lands lying in different counties^b. So too if livery in deed be made in the name of the whole of a manor, which extends to two counties, livery in one county is sufficient^c. Livery of lands lying in different places and in different counties.

(6.) The ceremony of livery was first instituted, that the *pares* of the county might, upon any dispute concerning the freehold, be able to judge, in whom the right was^d. Hence no estate of freehold can be made to commence *in futuro* by feoffment and livery immediately given thereon^e. But on the creation of a freehold remainder, where there The livery cannot create an estate of freehold to commence *in futuro*.

^y Co. Litt. 52. b. Shep. T. 217: and so, it should seem, as to *receiving* livery. See Co. Litt. 49. b.

^z Litt. s. 418. 2 Roll. Ab. 11.

^a 2 Roll. Ab. 11. pl. 2. Perk. s. 227.

^b Co. Litt. 48. b. 2 Bac. Ab. 486.

^c Perk. s. 227.

^d 2 Bac. Ab. 486.

^e Co. Litt. 27. a. 5 Co. 94. b. 2 Vent. 204.

The livery can-
not create an
estate of free-
hold to com-
mence *in futuro*.

is a preceding estate for years, as a term for three years to A. remainder in fee to B., if livery of seisin, which must be in *deed*, be made to the tenant for years, the freehold is immediately created, and vested in B. during A.'s term^g. For this is an estate, though to be enjoyed *in futuro*, yet commencing *in presenti*. But there would be no notoriety or evidence, if after livery made the freehold still remained in the feoffor^h; as where a feoffment is made to B. in fee, his estate to commence seven years from that time, or after the feoffor's death. In such case the investiture would rather create, than prevent, uncertainty.

If a livery be made to a lessee for years, remainder to the right heirs of B., this livery is void; because *nemo est hæres viventis*ⁱ, and because it is a rule, that no contingent remainder can be supported without a preceding estate of freehold. But if A. lease to B. for years, on condition, that if B. pay him a certain sum on such a day, then B. shall have the fee-simple; upon livery of seisin to B. the freehold passes to him conditionally^k. But if B. had an estate for *life*, with a like condition, the livery would not have carried

^g Litt. s. 60. 2 Black.
166. Co. Litt. 49. b.

^h 2 Roll. Ab. 7. pl. 8.
Cro. El. 344.

ⁱ Co. Litt. 217. a.

^k Litt. s. 350.

the inheritance, till the performance of the condition¹.

The livery cannot create an estate of freehold to commence in futuro.

(7.) As the design of livery was to denote the change of possession, it must follow, that the possession, which is delivered, should be vacant. Therefore, it is generally true, that every feoffor should have *actual* possession^m: and where a man has let his lands out on lease, or has them extended on a statute merchant, &c. he cannot, whilst the lessee or conuzee is in possession, make a valid feoffment, and livery of themⁿ. But this must be understood, where the lessee or tenant is averse to such feoffment and livery; for where he consents, it is clearly good^o; and if there be several tenants, there must be as many liveries^p. But in speaking of tenants of the lands, tenants at will and at sufferance are not included; for their consent is by no means necessary^q. Though the feoffor's lands are out upon lease, yet if he can obtain a clear and actual possession (though the lessee dissent), the livery is

Of livery of lands in the possession of a lessee, &c.

¹ Co. Litt. 217. b.

^m Co. Litt. 48. b. 2 Roll. Ab. 3, 4. Dy. 33. a. b. Cro. El. 322.

ⁿ See the above cases, and 2 Co. 31. b.

^o Co. Litt. 48. b. Dy. 33. a. b. Concerning an implied consent, see 2 Roll.

Ab. 5. The consent of the

lessee will not operate as a surrender or forfeiture of his lease. Moor, 11. pl. 41, 42. 20 Vin. 127. F. Dy. 33. a.

^p Dy. 18. a. b. pl. 106. 2 Black. Com. 316.

^q 2 Roll. Ab. 4. Dy. 18. b.

Of livery of
lands in the
possession of a
lessee, &c.

valid; and it is immaterial, whether such possession be gained by the lessee's own absence^r, or by the ouster of him by the feoffor^s. Yet in cases of ouster, and absence of the lessee, the possession of any part of the lands by his wife, children, or servants, has been deemed sufficient to avoid the livery^t. And as the servant is supposed to act for the benefit of his master, even his permission will not make good the livery^u, though indeed the subsequent consent of the master will^x. But the cattle of the lessee continuing upon the land will not affect the operation of the livery^y.

How the livery
can correct the
limitations in
the deed of
feoffment.

(8.) A charter of feoffment was found particularly useful in pointing out the certainty of the limitation of the estate intended to be conveyed by the feoffment and livery: for parol limitations, at the time the livery was made, must ever have been liable to objections and disputes. Yet it was said, that the livery would alter and correct the limitation made in the charter of feoffment. Thus, if the charter had been made in *fee*, and the feoffor had delivered seisin for *life*, the feoffee could have held but for *life*^z. But at the same time, as the livery was endorsed, it pre-

^r Dy. 363. a. 2 Roll. 4.
pl. 11.

^s Moor, 91. pl. 226.

^t Co. Litt. 48. b. 2 Roll.
Ab. 4, 5. Bro. Feof. 66.

^u 2 Roll. Ab. 5.

^x Ibid.

^y Co. Litt. 48. b.

^z Co. Litt. 222. b.

vented any uncertainty. However, if in that case the livery had been made for life, *secundum formam chartæ*, the feoffee would nevertheless have had the *fee*; because the livery then had a reference to the deed, which limited the estate in fee^y.

How the livery can correct the limitations in the deed of feoffment.

These remarks, it is hoped, will afford a sufficient knowledge of the general rules relating to livery of seisin. According to the present disuse of the conveyance by feoffment, there are very few other cases to be found on the subject of any real consequence. They, however, who wish to search more minutely into this learning, are referred to the authors cited below^z.

(9.) Though the conveyance by feoffment is now very seldom resorted to, it is by no means an obsolete conveyance. In some cases it operates as strongly as the conveyances by fine and recovery: in others more forcibly: and the operation of it in those particular instances will be the subject of our inquiries.

The operation of the feoffment in particular cases.

(9.) 1. It has the effect of barring or destroying contingent remainders depending

As to the destruction of contingent remainders.

^y Co. Litt. 48. a. 222. b. 331. a.

Com. Dig. Feoff. West, Symb. pl. 1. s. 235 to 264.

^z Vin. Ab. Feoff. 2. Ba. Ab. Feoff. 2 Roll. Ab. Feoff.

Shep. T. 199 to 217.

As to the destruction of contingent remainders.

upon particular estates. This quality is annexed to a fine and recovery, but not to a bargain and sale, lease and release, or grant^a. In Archer's case^b, where lands were devised to A. for life, and to the next heir male of A. and the heirs male of the body of such next heir male (which limitation was deemed a contingent remainder to the son of A.), it was determined, that the feoffment of A. destroyed the contingent remainder to his next heir male. So if there be tenant for life, remainder to the right heirs of J. S., and the tenant for life make a feoffment during the life of J. S.; the particular estate is determined, and the contingent remainder to the heirs of J. S. destroyed^c.

Shifting and future uses.

(9.) 2. It was observed in a preceding page, that a springing or shifting use cannot be barred by feoffment, fine, or recovery; unless the seisin, out of which it is to be served, be disturbed; as in the case of a covenant to stand seised to the use of such a person upon a particular event: in which, until the contingency happens, the use in fee results to the covenantor; and the covenantor, before the use vests, may by a feoffment prevent its taking effect^d. But though a man cannot

^a 3 Wils. 245. See post Bargain and Sale, &c.

^b 1 Co. 66. b.

^c Litt. Rep. 160.

^d See supra, 143 to 149. 1 Vol.

bar a shifting or future use to a third person, Shifting and future uses. except in the instance just mentioned, yet he may exclude himself by a feoffment from all future uses and possibilities. Thus in a case^e where J. S. covenanted to convey lands to the use of himself in fee, until such time as he the said J. S. his heirs, executors, or administrators, should make default in payment of a certain sum, and after such default to the use of the queen, her heirs and successors, until her heirs and successors should receive a certain sum ; after which period to the use of J. S. and his heirs for ever ; J. S. levied a fine to those uses ; and afterwards, being seised accordingly, he *bargained* and *sold* the lands to a stranger. Default was then made in payment of the money ; the queen seized the lands, and granted them over to another and his heirs, *quousque* the money be paid. Afterwards J. S. paid the money ; and the question was, whether he could have the lands again contrary to his own express bargain and sale. It was resolved, that as J. S. at the time of the bargain and sale had an estate in fee, *determinable* upon a default of payment, according to the first limitation of the use ; so that determinable fee only passed by the bargain and sale, and not the *new* estate, which accrued by the latter limitation after the money paid, for *that* was not *in esse* at the time of the bargain

^e 1 Leon. 33. pl. 40. See 112. a. b. Hob. 337.
also 1 Co. 174. b. 111. b.

Shifting and future uses.

and sale : but that if J. S. had conveyed by *feoffment* or *fine*, then he would have barred himself from ever taking under the latter limitation of the use.

Powers in gross, &c. rents, common, &c.

(9.) 3. A feoffment destroys powers *appendant* and powers in *gross* ; but not powers *collateral*^f : and it bars the feoffor of all interest in the lands, such as rents, common, and the like^g ; and also of the benefit of a condition of re-entry, writs of error, and attain, &c.^h

So if a man seised of an estate of inheritance in his own right, and possessed of a lease for years *in futuro* in right of his wife, make a feoffment of the land ; by the feoffment the term is extinguishedⁱ. But in this case, if the grantor had conveyed by bargain and sale, the lease would not have been affected by it^k. So it should seem, that if A. be entitled to a rent-charge issuing out of the manor of D. in right of his wife, and afterwards purchase the manor ; by a bargain and sale thereof the rent will not pass^l.

As to the operation of a feoffment in creating an estate of freehold by disseisin ; and the nature of the estate thus created.

(9.) 4. A feoffment is the only conveyance, by which a tenant for years, by elegit,

^f See *supra*, 1 vol. 171, et seq.

^g Shep. T. 199.

^h *Ibid.* 200. 1 Co. 112.

a. b.

ⁱ See Bracebridge's case, Plowd. 422, 423. Moor, 171. pl. 304. 1 Leon. 5.

^k Moor, 171.

^l 1 Leon. 6.

statute merchant, or staple, or a copyholder can create an estate of freehold by disseisin^m. The utility of the feoffment, in this instance, exceeds all other conveyances. As to a recovery, there is an absolute necessity, that there should be a tenant of the freehold, against whom the writ of entry may be brought: and as to a fine, if a tenant for years, &c. levy a fine without having previously created a freehold by disseisin, the fine may be avoided by pleading *partes finis nihil habuerunt*ⁿ.

As to the operation of a feoffment in creating an estate of freehold by disseisin; and the nature of the estate thus created.

To make a feoffment valid, nothing is wanting in the feoffor but *possession*; and when he has it, though it be but a naked one, the livery will create an estate of freehold by disseisin^o: and the estate of freehold thus created will be sufficient, as I have before said, to support a fine levied upon it.

Thus in a case cited by Mr. Knowler^p, where cestuique use, *before* the statute of uses, conveyed the use by *bargain and sale*, and afterwards levied a *fine* to a *stranger*: the question was, whether the fine was not void. Neither of the parties had any thing in *use* or *possession*; for by the bargain and sale the

^m See Co. Litt. 49. a. 2 ^o 1 Burr. 92. Bro. Dis. Inst. 413. 64. Bract. lib. 2. fol. 31. a.

ⁿ See 1 P. W. 519. 1 11. b.
Vent. 241. 2 Atk. 241. 3 ^p 1 Burr. 25.
Atk. 562. Hard. 401.

As to the operation of a feoffment in creating an estate of freehold by disseisin; and the nature of the estate thus created.

use was in the *bargainee*; and consequently, there was nothing remaining in the *bargainor*, nor conveyed to the *stranger*. It was argued, that if the fine were not good, great inconvenience would follow; for that many recoveries had been suffered against the bargainor, after he had conveyed the use. To this Fitzherbert replied, that it was the folly of purchasers, that they did not take a *feoffment* from cestuique use, before the fine was levied: for if they did, the *fine* would be *good*. For his part, he said, he would never purchase any land without taking a *feoffment*; so that he might be in *possession*, when the fine should be levied; for then the fine would be *undoubtedly* good. In this case, the feoffment by the bargainor, after the bargain and sale, could not have been warranted by the statute 1 Rich. 3. c. 1., supposing he had made it to the stranger; because after that period, in fact *he* was not *cestuique use*.

In the case of *Focus v. Salisbury*^a, lord Hale observes, “When lessee for years or at will is to levy a fine, it is *usual* for the lessee to make a feoffment first, to *displace the other estates*.” So lord Coke, in speaking of a tenant by copy of court roll, observes, that if he make a feoffment in fee, and levy a *fine*,

^a Hard. 400.

with proclamations, and five years pass, the lord is barred^r.

As to the operation of a feoffment in creating an estate of freehold by disseisin; and the nature of the estate thus created.

But if a tenant at will, copyholder, or lessee for years, make a feoffment, and levy a fine, and still continue in *possession*; his payment of rent, or performance of services, will be deemed a fraudulent circumstance, and will prevent the operation of the feoffment and fine in barring the owners of the inheritance. Thus, in Fermor's case^s, where R. F., seised of the manor of S., leased some lands, parcel of the said manor, to J. S. for years; who was also possessed of other lands at the *will* of R. F., and held lands of the said manor by *copy* of court roll; J. S. made a feoffment with livery to C. for life, and then levied a fine with proclamations. J. S. continued in possession, and paid the rents to R. F. And it was resolved, that as the feoffment was made, and as the fine was levied by fraud and covin, the owner of the fee should not be bound by the five years non-claim.

Though a feoffment by tenant for years, &c. will create a freehold by disseisin, which estate of freehold will support a fine, yet a feoffment by tenant in tail in remainder will not create such an estate of freehold, as can

^r Co. Law Tracts, 126.

^s 3 Co. 77. a.

As to the operation of a feoffment in creating an estate of freehold by disseisin; and the nature of the estate thus created.

support a common recovery. This point was settled in the case of *Atkyns v. Horde*¹; in which a distinction was made between an actual disseisin and a disseisin at the *election* of the parties. But it does not appear to me, that the distinction theretaken was applicable to the case of a disseisin created by a feoffment; the case indeed seems rather to have been determined upon general principles of justice, than from strictly legal conclusions. Lord Mansfield, in delivering the opinion of the court, observed, that if the question had been, whether tenant in tail *in remainder* should by an injurious entry and feoffment acquire a benefit to himself to the prejudice of the reversioner; it would have been adjudged, from *eternal principles of justice*, that an act founded on wrong should *not*, by virtue of the *crime itself*, become legal for the author's advantage. "And now," added his lordship, "it is agitated, when common recoveries are established as a *species of alienation*: and the question is, whether the rule of law, which requires the concurrence of the owner of the first estate for life, shall be overturned? 'Tis better to subvert the rule *directly*, than suffer it to be done by a secret *injurious entry* and feoffment."

The notion of a disseisin *at election* arose from the circumstance of a man's *supposing*

¹ 1 Burr. 60. Cowp. 689.

himself to be disseised, when *in fact* he was *not*, for the sake of entitling himself to the easy and commodious remedy by assize of *novel disseisin* (which was the common method of trying titles, till the ejectment came in use"), instead of being driven to the more tedious process of a writ of entry. The remedy by assize of *novel disseisin* was introduced to redress *actual* disseisins recently committed; and the facility of that remedy induced others who were wrongfully kept out of the freehold (though not by an actual disseisor), to allow or feign themselves to be disseised, merely on account of the remedy^w.

As to the operation of a feoffment in creating an estate of freehold by disseisin; and the nature of the estate thus created.

Mr. Butler^x, in a note upon this subject, observes, that "By a disseisin at the election of the party, is not to be understood an act which in itself is a disseisin, but which the party supposed to be disseised may, if he pleases, consider as *not* amounting to a disseisin; on the contrary, every act which is susceptible of being made a disseisin by election, is *no* disseisin, *till* the party in question, by his election, makes it such." The case of *Blundel v. Baugh*^y is an instance of a disseisin at election. In that

^u Burr. 110.

^y W. Jones, 315, 316.

^w See 3 Black. Com. 170, 171.

See the cases cited 1 Bur. 111, 112, 113.

^x Butl. Co. Litt. 330, b. n. 1.

As to the operation of a feoffment in creating an estate of freehold by disseisin; and the nature of the estate thus created.

case the judges held, that if a tenant at will make a lease for years, rendering rent, and his lessee enter and pay rent, that can be no disseisin, unless at the election of the first lessor. In this case the original act by the tenant at will, viz. the making the lease for years, was not of itself sufficient to create a disseisin; but if the first lessor had feigned himself to be disseised for the sake of the remedy, then it would have become a disseisin upon the election of the first lessor.

It follows, from the above explanation of a disseisin at the election of the party, that every act, which *immediately* of itself creates a disseisin, must be considered as an *actual* disseisin. Now the feoffment of a tenant for years at will, &c. had the peculiar force of creating an *immediate* estate of freehold in the feoffee, with all the rights and incidents annexed to it; the estate of the feoffee became *immediately* subject to dower and curtesy, and the descent upon the heir *immediately* took away the entry of the disseisee².

It was said indeed in the above case of *Atkyns v. Horde*, that where the books speak of an actual disseisin created by the feoffment of a tenant for years, &c. it must be understood of feoffments of *old*, attended with li-

² See Butl. Co. Litt. 330. b. note 1.

very, and an *actual* transmutation of the possession; but that conveyances had now languished into *mere form*, and had lost their *efficacy* and *solemnity*.

As to the operation of a feoffment in creating an estate of freehold by disseisin; and the nature of the estate thus created.

But Mr. Butler, in the excellent note referred to, has endeavoured to prove (and I think successfully), that feoffments from the time of Henry the second (which is prior in point of time to the instances given by the judges as cases of *old* feoffments) to the present period, have not been made with any other solemnities, than those with which they are made at present; and of course that the operation and *efficacy* universally allowed them by courts of judicature, and writers of authority, from that monarch's reign, must be ascribed to them *now*. Mr. Butler concludes by observing, that from the authority of Bracton and others, the disseisin produced by *feoffments* must be understood to be an *actual* disseisin, and not a disseisin merely at the *election* of the party; that, however slender, bare, or tortious, the possession of the feoffor is, his feoffment necessarily and unavoidably vests the freehold in the feoffee, till the disseisee, by entry or action, restores his possession: and that a fine may be levied of, or common recovery suffered upon, this estate of freehold by disseisin; which feoffment, fine, and recovery, will in process of time bar the owner of the freehold and inheritance.

As to the operation of a feoffment in creating an estate of freehold by disseisin; and the nature of the estate thus created,

There is a case, that must occasionally come before professional gentlemen, which is principally founded on the learning of disseisins:—Suppose A. to be possessed of a term of 1000 years, under a decree of foreclosure, made perhaps 50 or 100 years ago; and on account of the great length of time since the term was first created, it is impossible to ascertain the owners of the reversion in fee; in this case, if A. the termor is desirous of obtaining the freehold and inheritance, and for the reasons just given he cannot legally purchase the reversion, he may by a feoffment and fine absolutely acquire the fee; and as the reversioner is here unknown, and as there is no payment of rent, or the like, which would, according to *Fermor's case*, admit the possession of the reversioner, there can be nothing to obstruct the full force and operation of the feoffment and fine.

In a case of this kind, it seems advisable, that the term should be previously assigned to an indifferent person; that a feoffment with livery of seisin should then be made and a fine levied. The uses of the feoffment and fine may be declared either to the feoffor or a purchaser; but there should be a declaration of the trusts of the term to attend the inheritance, not generally, but as acquired by the feoffment and fine^a.

^a See Vol. I. 32 to 45.

In *Brandlyn v. Ord*^a, lord Hardwicke said, “that a fine levied by a *termor* for years “is a forfeiture; but the reversioner has five “years *after the expiration* of the term to “enter.” The rule is confirmed by the case of *Whaley v. Tancred*^b; which was that of a feoffment made, and fine levied, by a lessee for years: and the reason of it is, because the lessee is trusted with the possession, and there is a privity between him and the lessor: and, as lord Hale observed^c, it is like a mortgage, where the mortgagor *continuing in possession* levies a fine.

As to the operation of a feoffment in creating an estate of freehold by disseisin; and the nature of the estate thus created.

But in the case above stated of a termor after a decree of foreclosure, there cannot, I conceive, be any privity between him and the reversioner. During the existence of the equity of redemption, there was indeed a privity: but the decree put an end to the confidence between them; at least in the relation of mortgagor and mortgagee. The above case is rather more similar to that put in *Margaret Podgers case*^d: *lessee* for years, and the *lessor*, are *both* disseised, and a fine is levied upon such newly-acquired estate by disseisin; after five years run upon the fine from the time it was levied, the lessee and

^a 1 Atk. 571.

fret v. Windsor, 2 Ves. 481.

^b *Whaley v. Tancred*, 1 Vent. 241. T. Raym. 219. See also *Shields v. Atkins*, 3 Atk. 562, 141. 339. Pom-

^c Hard. 402.

^d 9 Co. 105. b.

As to the operation of a feoffment in creating an estate of freehold by disseisin; and the nature of the estate thus created.

lessor are both barred. Now the feoffment in the principal case after the assignment of the term would create a disseisin, I imagine, not only as against the reversioner, but as against the assignee or trustee^e of the term. Though the case, cited from Margaret Podger's case, has been doubted^f; I do not know, that it has been expressly over-ruled; on the contrary, the distinction appears to have been recognized in *Whaley v. Tancred*.

I shall conclude by citing the opinion of lord Hardwicke^g, who said, if a man purchase an estate, which he sees himself has a defect upon the face of the deeds, a *fine* levied will be a bar; for the defect upon the face of the deeds is often the *occasion* of the fine's being levied.

^e See 2 Ves. 481.

^g 2 Atk. 631.

^f 2 Vent. 334.

G R A N T.

Description of
a grant.

THE principal conveyances at common law were by feoffment and grant; the former was applicable to *corporeal*, the latter to *incorporeal*, hereditaments; the transfer was complete in the one case by the livery of seisin; in the other, by the delivery of the deed, and of attornment. A grant was therefore said in some instances by the additional ceremony to be a conveyance *in writing* of property, which could not pass by livery of seisin.

The term *grant*, is generally applied to conveyances by feoffment, fine, recovery, lease and release, bargain and sale, and covenant to stand seised. But the simple grant at common law is complete without any of the ceremonies peculiar to the above conveyances. It does not require inrollment^a, nor a prior lease for years, nor the consideration necessary to establish a covenant to stand seised to uses. Livery of seisin is al-

^a See post, sec. 2.

Description of a grant. together inapplicable to it, and it is not matter of record.

But though the conveyance by grant at common law is confined to property lying *in grant*; yet that kind of property may be also transferred by conveyances, adapted to the transfer of corporeal hereditaments. I shall, therefore, in this place direct my inquiries, First, as to the several kinds of *incorporeal* hereditaments of a grantable quality, and the several conveyances by which they may be granted: Secondly, as to attornment, and the effect of the statute of inrollments and the 4th Anne, c. 16. s. 9. upon the ancient grant at common law: Thirdly, as to the operative words of a grant: Fourthly, as to the operation of a grant by tenant in tail.

As to the several kinds of incorporeal hereditaments of a grantable quality, and the several conveyances by which they may be granted.

Common.

(1.) Common of pasture, of turbary, of fishing, and of estovers, may in general be conveyed by way of grant, in fee, for life or years, from man to man *in infinitum*^b. But the books, though not very clear upon the subject, seem to make the following distinctions in respect of common of pasture. Common *appendant* for pasture cannot by grant or otherwise be severed from the land^c; neither can common *appurtenant*, if it be for cattle

^b Shep. T. 238. 239.

niel v. Hertford, Cro. Car.

^c Perk. s. 104. See Da- 542.

levant and couchant, or without number^d. But common *appurtenant* for a *certain number* of beasts may by grant be severed from the soil, and thereby made common *in gross*^e. As to common *in gross* in fee, it may be granted over, though it be *without number*^f; but it is said, that a grantee *for life*^g, or *years*^h, of common of pasture (which must be understood of common *in gross*) for cattle without number, cannot transfer the same; unless the original grant be made to him *and his assigns*ⁱ.

As to the several kinds of incorporeal hereditaments of a grantable quality, and the several conveyances by which they may be granted.

Common, of the grantable quality just described, may be transferred by grant at common law^k; or it may be extinguished by a release to the tenant of the land^l; and common *certain* may be granted by fine^m, though not by recoveryⁿ. It seems doubtful, whether *before the statute of uses* common of pasture could have been conveyed by bargain and sale, or covenant to stand seised^o; but as the statute comprises all kind of *incorporeal* property, which may lawfully be granted

^d Drury v. Kent, Cro. Jac. 15. 1 Roll. Ab. 402.

^k See Litt. s. 617. West, Symb. pl. 1. s. 294.

^e Ibid. and see Spooner v. Day, Cro. Car. 432.

^l Shep. T. 322.

^f 2 Roll. Ab. 46. pl. 15.

^m Ibid. 10. 1 Cruise, 121.

ⁿ Pig. 96. 2 Cru. 168.

^g Perk. s. 103.

^o See W. Jones, 118. 127.

^h 2 Roll. Ab. 46. pl. 16.

Bro. Tit. Feof. al. Uses, pl. 10.

ⁱ Sed quare, and see Roll. supra.

As to the several kinds of incorporeal hereditaments of a grantable quality, and the several conveyances by which they may be granted.

Rents.

by one to another, it will now pass by either of those conveyances.

A rent *in esse* may be granted or assigned, even before the grantor has seisin of it^p; but not during its suspension^q; and a rent-charge may be conveyed by fine^r and recovery^s, lease and release, bargain and sale, and covenant to stand seised^t, as well as by the grant at common law.

So a rent may be reserved on, and created by a fine^u, bargain and sale^x, and consequently a lease and release. It may also be reserved out of the estate or seisin of a recoveror in a common recovery^y. But the grant of a rent-charge out of lands, of which the grantor is not seised at the time of the grant, is void; though the grantor should afterwards purchase the same lands^z: unless perhaps the grant be by fine *executory*^a. So no rent can be reserved out of a rent^b, or other incorporeal hereditament^c: and if a disseisee release to his disseisor, reserving a rent, such reservation is void^d.

^p Shep. T. 238. Perk. s. 91.

^q Shep. T. 238.

^r Ibid. 11.

^s See Pig. 97.

^t See Lade v. Barker, 2 Vent. 260. 266.

^u Shep. T. 5. 2 Roll. Ab. 18.

^x Co. Litt. 144. a.

^y Cromwell's case, 2 Co. 69. b. 72. b.

^z Perk. s. 65.

^a Ibid. 65, 66. and see Shep. T. 11. 243.

^b Shep. T. 238.

^c Co. Litt. 144. a.

^d Ibid.

Vested remainders *in fee* and reversions may be granted or transferred by grant^e, bargain and sale^f, lease and release^g, covenant to stand seised^h, fineⁱ, or a release to the particular tenant^k; but not by a recovery^l, nor feoffment. So a remainder *in tail* can only be conveyed by fine^m. As to *contingent* remainders, they may be destroyed, as I have before observed, by feoffment, fine, or recovery; but they can only be conveyed by fine by way of *estoppel*, and perhaps by a common recoveryⁿ.

As to the several kinds of incorporeal hereditaments of a grantable quality, and the several conveyances by which they may be granted.

Remainders and reversions.

The interest which a lessee has in his lease before entry is capable of being assigned^o. But if A. make a lease for forty years to B., and it is covenanted, that if the premises be well repaired at the expiration of the term, the lessee shall hold over for a further term of years; it seems doubtful, whether the interest of the lessee in the second term be assignable *at law*^p.

Interesse termini.

The proprietor of land may grant the emblements, or fruits and produce thereof^q;

Emblements.

^e Litt. s. 568.

^f Vaugh. 51.

^g Butl. Co. Litt. 270. a. note 3.

^h 5 Co. 8. b. 11. [Co. 46. b. 47. a.

ⁱ See Shep. T. 13.

^k Litt. s. 575.

2 Cru. 30, 31.

^m 3 Co. 84. a.

ⁿ See Fearn, Cont. Rem. 537. 4th edition. Weale v. Lower, Poll. 54.

^o Co. Litt. 46. b.

^p See Skerne's case, Moor, 27.

^q Perk. s. 57. 59.

As to the several kinds of incorporeal hereditaments of a grantable quality, and the several conveyances by which they may be granted.

Tithes.

and not only such as are actually upon the land at the time of the grant, but such as may afterwards grow thereupon, or arise out of it^o; for, say the books, the land is mother and root of all fruits, and the proprietor of it is possessed of the present fruits *actually*, and of the future *potentially*^p. So a parson may grant all the tithe wool, that he shall have in such a year; but a man cannot grant all the wool, which shall grow upon his sheep, which he shall afterwards purchase; for he hath not the latter actually, nor potentially^q.

Advowsons.

Advowsons are conveyed by grant at common law^r; and as they may be limited to uses, they may be also transferred by bargain and sale, covenant to stand seised, and lease and release. So a fine may be levied of an advowson^s: and if it be *appendant* to a manor, a recovery may be suffered of it upon a writ of entry *en le post*^t. But if the advowson be *in gross*, the recovery must be

^o 2 Roll. Ab. 47, 48. So there may be a grant as well of trees then growing, as of trees which shall thereafter grow upon the soil. See sir Francis Barington's case, 8 Co. 136. b. and 14 East, 338, 339. in Stanley v. White.

^p See Grantham v. Hawley, Hob. 132.

^q Ibid.

^r Litt. s. 617. Co. Litt. 332. a. A prebendary cannot charge his prebend before induction. Hare v. Buckley, Plowd. 526. 528.

^s 8 Co. Rep. 145. a.

^t Dormer's case, 5 C. Rep. 40.

suffered upon a writ of right of advowson^u: or if it be suffered of the advowson, *together with a small quantity of land*, then it may be suffered upon a writ of entry *sur disseisin*^x.

As to the several kinds of incorporeal hereditaments of a grantable quality, and the several conveyances by which they may be granted.

A corrody *certain*^y, and services^z, are grantable in fee, or life, or years; and so are seignories and franchises; such as views of frankpledge, and perquisites of courts; to have waifs, wrecks, estrays, treasure trove, royal fish, forfeitures, and deodands; the conveyance of pleas or bailiwick, fair or market, a forest, chase, park, warren, or fishery, and the like^a.

Corrody, services, seignories, and franchises.

A tenant in fee-simple may grant the title-deeds of his estate, and the grantee may either keep or cancel them: but not so as to a tenant in tail^b.

Charters.

On the other hand, there are several kinds of incorporeal property, which the policy of the law does not permit to be the subjects of grant or transfer. Thus offices of trust and confidence are not grantable; unless in some special cases, where they are expressly granted to a man and *his assigns*, or to him *and*

Offices of trust.

^u See 2 Cru. 167.

^x Baley v. University of Oxford, 2 Wils. 116.

^y Perk. sec. 103. 2 Roll. Ab. 45.

^z Shep. T. 238. Secus

as to a corrody uncertain 2 Roll. 45.

^a Shep. T. 239.

^b Ibid. 241, 242. Co. Litt. 232 b.

As to the several kinds of incorporeal hereditaments of a grantable quality, and the several conveyances by which they may be granted.

his heirs^c. So an annuity *pro concilio in posterum impendendo* cannot be transferred; unless the original grant thereof expressly authorize an assignment^d: and it has been lately determined, that the pay of an officer in the army is not assignable^e.

Indeed in no case will the law permit the transfer of *choses in action*^f. Courts of equity however have in most instances supported assignments of them. A bond, the benefit of a decree or judgment^g, a seaman's wages^h, and the like *choses in action*, may be transferred in equity; such equitable transfer being considered in the nature of an agreement, of which the Court of Chancery directs the performance.

As to attornment, and the effect of the statutes of inrollments, and 4th Anne, c. 16. s. 9. upon the conveyance by grant.

(2.) Incorporeal property arising from, or consisting of rights to, land, and of the grantable quality before described, may be divided, as Mr. Fearne has observed, into two general classes: "The first, comprising

^c Perk. sec. 99, 100. Shep. 239. 241. 2 Atk. 14. 332. See Priddy v. Rose, 3 Mer. 86. A pension for past services may be aliened; but a pension for supporting the grantee in the performance of future duties, is inalienable. Davis v. duke of Marlborough, Swanst. 74. and the cases there cited.

^d Perk. s. 101. 7 Co. 28. c. See Har. Co. Litt. 144. b. note 1.

^e Flarty v. Odum, 3 Term Rep. 681. Lidderdale v. Montrose, 3 Term Rep. 248.

^f Co. Litt. 214. a. See 2 Black. Com. 442.

^g 3 P. W. 199. 200.

^h Crouch v. Martin, 2 Vern. 595.

“ such real hereditaments as consist of rights
 “ to future enjoyment of lands divided from
 “ the right of present possession, as *remain-*
 “ *ders* and *reversions*, together with such mix-
 “ ed hereditaments as consist in things issu-
 “ ing out of lands, or to be rendered, paid,
 “ or done, by the tenants or owners of lands
 “ in respect to the tenure thereof. The other
 “ class, extending to all the residue of incor-
 “ poreal hereditaments, namely, to those mix-
 “ ed hereditaments which, though they re-
 “ late to lands, or some benefit thereout, or
 “ have a local relation, yet are distinct from
 “ the ownership or right of enjoyment of
 “ the lands themselves, or of any thing to
 “ be paid, rendered, or done by the tenants
 “ or owners of land in respect of the tenure
 “ thereof.”

As to attorn-
 ment, and the
 effect of the
 statutes of in-
 rollments, and
 4th Ann. c. 16.
 s. 9. upon the
 conveyance by
 grant.

A deed was necessary to the transfer of every kind of *incorporeal* property; and as to the hereditaments falling within the latter of the above classes, they passed by the mere delivery and execution of the deed. But to the conveyance of those hereditaments, which are comprised in the first branch of the above division, the additional ceremony of *attornment* was necessary; which was nothing more, than the consent of the tenant of the land to the disposition or grant intended to

¹ See Fearn's Posth. Works, 12.

As to attornment, and the effect of the statutes of inrollments, and 4th Ann. c. 16. s. 9. upon the conveyance by grant.

be made. Attornment in cases of this kind was as necessary, as livery of seisin in the conveyance of corporeal estates^k.

It is to be observed, that a use might have been raised upon a bargain and sale for a pecuniary consideration, and upon a covenant to stand seised in consideration of blood or marriage; and by the mere operation of the statute of uses, the legal estate was transferred to the bargainee in the one instance, and to the covenantee in the other. No ceremony was made necessary by that statute to either of those conveyances: and therefore the solemnities of livery of seisin and attornment, were, in fact, totally superseded by it; for as the most trifling pecuniary consideration could raise a use for the benefit of the bargainee, it was no difficult matter to contrive, that every conveyance, not operating as a covenant to stand seised, should fall within the description of a bargain and sale. To correct this inconvenience occasioned by the statute of uses, so far as it related to *bargains and sales*, the statute of inrollments was made^l; which enacted, that no hereditaments should pass from one man to another, whereby

^k It is proper here to observe, that if a man had leased his land *at will*, and had afterwards granted the land to another, the land would not have passed by

the attornment of the tenant at will, because the grantor had not a reversion.
1 Roll. Ab. 292. a. pl. 9.

^l 27 Hen. 8. c. 16.

any estate of freehold or inheritance should be made or take effect in any person, or any use or uses thereof to be made, *by reason only of any bargain and sale thereof*, except such bargain and sale be inrolled within six months next after the date thereof.

As to attornment, and the effect of the statutes of inrollments, and 4th Ann. c. 16. s. 9. upon the conveyance by grant.

From the evident import of the words of this statute, it seems clear, that if there had been a conveyance of *corporeal* hereditaments by livery of seisin, or a grant of *incorporeal* hereditaments falling within the first branch of the above division by deed and attornment, or if coming within the second branch of it, by deed only; the hereditaments, comprised in such conveyance or grant, could not have been said to pass *by reason only of a bargain and sale thereof*^m; but on the contrary, by reason of the livery in the one case, and of the deed and attornment, or deed only, in the other: and, that if there had been a grant of incorporeal hereditaments of the first description for a pecuniary consideration *without attornment*, such grant would have been considered as a bargain and sale within the statute, and would have required inrollment as such.

Thus the matter stood upon the principles of the common law, and upon the construction of the statute of inrollments. But some

^m See 2 Inst. 671. 1 Leon. 6.

As to attornment, and the effect of the statutes of inrollments, and 4th Ann. c. 16. s. 9. upon the conveyance by grant.

doubts have arisen upon the statute of 4 Ann. c. 16. s. 9. ; by which it was enacted, " That
 " *grants* and conveyances by fine *or otherwise*
 " of any manors or *rents*, or of the *reversion*
 " or *remainder* of any messuages or lands,
 " shall be good and effectual to all intents
 " and purposes, *without any attornment* of the
 " tenants of any such manors, or of the land
 " out of which such rent shall be issuing, or
 " of the particular tenants, upon whose par-
 " ticular estates any such reversions or re-
 " mainders shall and may be expectant or de-
 " pending, as if their attornment had been
 " had and made."

It is manifest, that if this act be allowed to operate in the full extent of the above words, it will virtually repeal the statute of inrollments, so far as it related to hereditaments, which required the ceremony of attornment to transfer them.

As I have before observed, the statute of inrollments extended only to conveyances operating under the statute of uses by way of *bargain and sale*, for the purpose of introducing the ceremony of inrollment in the place of livery and seisin, and attornment, in cases where those solemnities were superseded by the operation of the latter statute. The act of inrollments was never meant to apply to those conveyances, which, operating under

the principles of the common law, were complete without the assistance of, or any reference to, the doctrines and statute of uses. Therefore, when incorporeal property described in the second of the above classes was intended to be conveyed, the grant thereof was perfect at the common law upon the execution of the deed only; and when that in the first of those classes was intended to be granted, the additional ceremony of attornment was necessary to the transfer. But in both cases *inrollment* was unnecessary. When indeed the ceremony of attornment was omitted in the latter case; the grant, if made for a pecuniary consideration, was considered as a *bargain and sale* within the statute. Why? Because it was otherwise incomplete: it could otherwise have no operation at all.

As to attornment, and the effect of the statutes of inrollments, and 4th Ann. c. 16. s. 9. upon the conveyance by grant.

Then the statute of Anne was enacted, which expressly directs, that all grants of rent, reversions, and remainders, shall be perfect *without attornment*. Now if we are to form a construction upon this statute from the general import of the words, the effect produced by it would be, that all incorporeal hereditaments, in respect to the transfer of them, are placed upon the same footing: that they will all pass without attornment by deed only; and consequently, that grants of hereditaments, described in the first branch of the above division, being now perfect without at-

As to attornment, and the effect of the statutes of inrollments, and 4th Ann. c. 16. s. 9. upon the conveyance by grant.

tornment, and without the aid of, or any reference to, the statute of uses, will no more require inrollment under the statute, when made for a consideration in money, than grants of hereditaments falling within the second of the above classes.

But Mr. Fearné has contended, that the statute of enrollments stands entirely unaffected by the statute of Anne respecting attornments; because it would be contradictory to all the rules, which hold in the construction of statutes, to extend such general indefinite words, as the words, *or otherwise*, in the statute of Anne, to the repeal of a preceding statute, unnoticed in the subsequent one^z.

It appears to me, however, that the words of the statute of Anne express the meaning of the legislature very clearly and distinctly: and if the manifest intention of the statute cannot be affected without a partial repeal of a preceding one, I can see no reason why the rule of law, which says, that *leges posteriores abrogant priores*, should not take place. The two statutes appear perfectly repugnant to each other, so far as they relate to incorporeal hereditaments, which require attornment to pass them: and I can see nothing contradictory to the rules, usually adopted in the con-

^z See Fearné's Posth. Works, 32, 33.

struction of statutes, in considering the former statute virtually repealed by the latter to the extent of such repugnancy.

As to attornment, and the effect of the statutes of inrollments, and 4th Ann. c. 16. s. 9. upon the conveyance by grant.

But an evident inconsistency would result from the construction contended for by Mr. Fearne. Suppose a voluntary grant of hereditaments comprised in the first of the above classes, without either a good consideration to support it as a covenant to stand seised, or a pecuniary one to establish it as a bargain and sale; as this grant does not interfere with the statute of inrollments, there can be no doubt but that it would be good by the statute of Anne *without attornment*; and yet, according to Mr. Fearne's construction, that statute would be altogether inapplicable to another grant of *the same hereditaments, and under the same circumstances*, excepting only in the trivial, and perhaps accidental one of having the consideration of a shilling, or a penny, so as to make it a bargain and sale within the statute of inrollments.

(3.) The word, *grant*, is the most proper for the transfer of incorporeal hereditaments. But it is not absolutely necessary in grants, strictly operating as such at common law by the mere delivery of the deed. Therefore it has been determined, that words of covenant^a, or

As to the operative words of a grant.

^a Mountjoy's case, 3 Lev. 305. 4 Leon. 147. 2 Ves. 9.

As to the operative words of a grant.

an instrument in the shape of an obligation^b, may amount to a grant of a way, or a rent-charge.

The word, *grant*, is essentially requisite in those cases only, where the conveyance, by which the *incorporeal* property is intended to pass, is *exclusively* applicable to the transfer of *corporeal* hereditaments; or being applicable to the transfer both of corporeal and incorporeal property, some ceremony, necessary to the completion of it, is omitted. Thus, no incorporeal property can pass by a feoffment, and livery, unless the word *grant* be used^c; and when a conveyance is intended to operate as a release, surrender, or confirmation, and such release, surrender, or confirmation, is defective, by reason that the releasee, surrenderee, or confirmee, has no estate to support the conveyance as a release, &c., or upon any other account; then such defective conveyance cannot operate as a *grant* of the *incorporeal* hereditaments intended to pass, unless the operative word, *grant*, be therein par-

^b Co. Litt. 147. a. 2 Roll. Ab. 424. or the words, "li-
"mit and appoint." Shove
v. Pincke, 5 Term. Rep.
124. 310.

^c See the opinion in 1
Bridg. Con. 323. 2 Roll.
Ab. 56. pl. 2. It should seem

from the books, that a feoff-
ment of a *reversion* or *re-
mainder*, with the subse-
quent *attornment* of the ten-
nant, would have amounted
to a *grant* before the statute
of Ann. See 2 Roll. Ab.
56. pl. 13. 2 Bac. Ab. 491.

ticularly applied to the transfer^d. So it has been determined^e, that where a *reversion* was intended to be conveyed by *bargain and sale*, by the words, *bargain and sell* only (the conveyance being void as a bargain and sale for want of inrollment), it should not pass by way of grant at common law with attornment^a.

As to the operative words of a grant.

As incorporeal hereditaments may be surrendered,^f released^g, and limited to uses^h, they may consequently be conveyed by surrender, lease and release, and bargain and sale, without the word *grant*ⁱ; because there are other particular terms appropriated to each of those conveyances.

(4.) A grant at common law passes such an estate only in the property conveyed as the grantor may lawfully transfer. It consequently does not work a *discontinuance*,

As to the operation of a grant in working a discontinuance.

^d See Litt. s. 541, 542. Co. Litt. 301. b. Cowp. 600. But see Shove v. Pincke, cited above.

^e Cro. Jac. 210. Moor, 34. pl. 113.

^a But see 3 Leon. 16. "If he in reversion on a lease for years, grants his reversion to his lessee for years by words of *de-di, concessi, feoffavi*, and a letter of attorney is made to make livery of

"seisin, the donee cannot take by the livery, for that the lessee hath the reversion presently."

^f Co. Litt. 338. a.

^g Shep. T. 321, 322.

^h See ante, I vol. 107. and post, tit. Bargain and Sale, sec. 6.

ⁱ See, as to a lease and release, Mr. Booth's opinion in 2 vol. of Cases and Opinions, 144.

As to the operation of a grant in working a discontinuance.

when made by tenant in tail of an advowson, common, remainder, or any other inheritance lying in grant^k.

^k Litt. sec. 616, 617. Co. Litt. 332. a.

BARGAIN AND SALE.

(1.) **THE** conveyance by bargain and sale Description of the conveyance by bargain and sale. was introduced before the statute of uses, and originated from an equitable construction of the Court of Chancery. A bargain was made, or a contract entered into, for the sale of an estate; the purchase-money was paid, but there was either no conveyance at all of the legal interest, or a conveyance defective at law by reason of the omission of livery of seisin, or attornment: that court properly thought, that the estate ought in conscience to belong to the person who paid the money, and therefore considered the bargainor or contractor as a *trustee* for him.

An equitable interest in land, thus raised and conveyed in the first instance by the payment of money upon a mere contract, or upon a conveyance unoperative at law, became, in process of time, transferrable by a formal conveyance under the name of a bargain and sale.

The bargainee, entitled to the use by virtue of this equitable conveyance, became im-

Description of
the conveyance
by bargain and
sale.

mediately seized of the possession by the statute of uses; and the operation of that statute, as I have before observed, tended, in effect, to supersede altogether the solemnities of livery of seisin and attornment: for whenever a pecuniary consideration was introduced into a conveyance, unaccompanied by livery of seisin, or attornment, such conveyance immediately became a bargain and sale; and the possession was thereupon transferred to the bargainee without any other ceremony, than the mere delivery of the deed. Therefore, to restore in some measure the policy of the common law, in adding notoriety to the transfer of property, the statute 27 Hen. 8. c. 16. directs, that every conveyance by *bargain and sale* shall be inrolled within six months¹ after the date thereof.

¹ 27 Hen. 8. c. 16. “ Be
“ it enacted by the autho-
“ rity of this present par-
“ liament, that from the
“ last day of July, which
“ will be in the year of our
“ Lord 1536, no manors,
“ lands, tenements, or other
“ hereditaments, shall pass,
“ alter or change from one
“ to another, whereby any
“ estate of inheritance or
“ freehold shall be made or
“ take effect in any person
“ or persons; or any use
“ thereof to be made, by
“ reason only of any bar-
“ gain and sale thereof, ex-
“ cept the same bargain
“ and sale be made by writ-
“ ing indented, sealed, and
“ inrolled in one of the

“ king’s courts of record at
“ Westminster, or else with-
“ in the same county or
“ counties where the same
“ manors, lands, or tene-
“ ments so bargained and
“ sold, lie or be, before the
“ *custos rotulorum*, and two
“ justices of the peace, and
“ the clerk of the peace of
“ the same county or coun-
“ ties, or two of them at
“ the least, whereof the
“ clerk of the peace to be
“ one; and the same inroll-
“ ment to be had and made
“ within six months next
“ after the date of the same
“ writings indented; the
“ same *custos rotulorum*, or
“ justices of the peace and
“ clerk, taking for the in-

(2.) The possession, or rather legal estate, thus transferred by the operation of the statute of uses, is equivalent, in most respects, to a possession or legal interest acquired by an actual entry, or attornment, under a conveyance operating at common law. Therefore if a bargain and sale be made for years of land in the possession of the bargainor, such estate for years is capable of receiving a release of the reversion before an

As to the possession of the bargainee under the statute of uses.

“ rollment of every such
 “ writing indented before
 “ them, where the land com-
 “ prised in the same writing
 “ exceeds not the yearly
 “ value of forty shillings,
 “ two shillings; that is to
 “ say, twelve pence to the
 “ justices, and twelve pence
 “ to the clerk; and for the
 “ inrollment of every such
 “ writing indented before
 “ them, wherein the land
 “ comprised exceeds the
 “ sum of ten pounds in the
 “ yearly value, five shillings,
 “ that is to say, two shillings
 “ and sixpence to the said
 “ justices, and two shillings
 “ and sixpence to the said
 “ clerk, for the inrollment
 “ of the same; and that the
 “ clerk of the peace for the
 “ time being, within every
 “ such county, shall suffi-
 “ ciently inroll and ingross in
 “ parchment the same deeds
 “ and writings, indented as
 “ is aforesaid; and the rolls
 “ thereof at the end of every
 “ year shall deliver unto the
 “ *custos rotulorum* for the
 “ time being, there to remain

“ in the custody of the said
 “ *custos rotulorum* for the
 “ time being, amongst other
 “ records of every of the
 “ same counties, where any
 “ such inrollment shall be so
 “ made; to the intent that
 “ every party that hath to
 “ do therewith, may resort
 “ and see the effect and
 “ tenour of every such writ-
 “ ing so inrolled,

“ Provided always, that
 “ this act, nor any thing
 “ therein contained, extend
 “ to any manor, lands, tene-
 “ ments, or hereditaments,
 “ lying or being within any
 “ city, borough, or town
 “ corporate within this
 “ realm, wherein the mayors,
 “ recorders, chamberlains,
 “ bailiffs, or other officer or
 “ officers have authority or
 “ have lawfully used to in-
 “ roll any evidences, deeds,
 “ or other writings within
 “ their precincts or limits;
 “ any thing in this act con-
 “ tained to the contrary not-
 “ withstanding.” See the
 Irish Act of 10 Car. 2. c. 1.
 s. 18.

As to the possession of the bargainee under the statute of uses.

actual entry by the bargainee^m; but it seems doubtful, whether the bargainee can maintain an action of *trespass* before an actual entryⁿ. So a bargainee of a reversion may avow for rent, or bring an action for waste without attornment^o; but it seems, that he must give notice of the bargain and sale, before he can take advantage of a condition for non-payment of rent^p. It is said, that a bargainee can never vouch by force of any warranty annexed to the estate of the land, because he is *in* in the *post*^q; but that he may rebut by virtue of it^r.

Consideration necessary to support a bargain and sale.

(3.) A *pecuniary* consideration is necessary to raise a use upon this conveyance^s; therefore the consideration of a long acquaintance, or of friendship^t, or of natural love and affection^u, or of marriage^w, or that the bargainee is bound in a recognizance for the bargainer^x, cannot create a use upon a bargain and sale.

^m See *Lutwich v. Mitton*, Cro. Jac. 604.

ⁿ 1 Vent. 361. Cro. Jac. 604.

^o 6 Co. 68. a.

^p Cro. Jac. 146. 476. 5 Co. 113. See Ow. 69.

^q 1 Co. 125. a. Gilb. 102. Sed contra, Shep. 222.

^r 2 Roll. Ab. 786, 787. pl. 1. Vide supra. 1 vol. 120, 121.

^s See 1 Co. 176. a. Note, in *Barker v. Keat*, 2 Mod. 252, it was said, that the reservation of a *peppercorn*

would raise a use in a bargain and sale for a year, in support of a *common recovery*. See 1 Freem. 249.; and generally upon this head, 22. Vin. 205. and the cases collected under Division O.

^t 2 Roll. Ab. 783.

^u *Osborn v. Churchman*, Cro. Jac. 127.

^w *Crossing v. Scudamore*, 1 Vent. 137.

^x *Ward v. Lambert*, Cro. El. 394.

But courts of equity, which originally created a use from motives of conscience upon payment of a *valuable* consideration, afterwards permitted it to be raised and transferred upon an actual conveyance by bargain and sale for any pecuniary consideration of the most trifling amount ; upon payment of five shillings, or upon the reservation of a rent of twelve pence^y.

Consideration necessary to support a bargain and sale.

The actual sum, paid by the bargainee, need not be stated, if the conveyance be expressed to be made in consideration of a *certain*^z or *competent*^a sum ; nor is there a necessity, that the money should be paid upon the execution of the bargain and sale ; for such bargain and sale may be made either conditionally, that a sum of money shall be paid upon a subsequent day^b, or absolutely in consideration of a future payment^c, or of a sum paid previously to the execution of it^d. But if a bargain and sale be made for *divers good causes and considerations*, no use can be raised upon such general consideration ; and yet the conveyance may be rendered valid by an averment, that money was actually paid^e. Indeed it was formerly determined,

^y 2 Roll, Ab. 787, 788.
10 Co. 34. a.

^z 2 Roll. Ab. 786.

^a Moor, 570. in Fisher v. Smith.

^b 1 Leon. 6.

^c Dy. 337. a. in pl. 34.

^d 3 Keb. 201.

^e See 1 Co. 176. a.

Consideration
necessary to
support a bar-
gain and sale.

that where a particular consideration was expressed in a deed, an averment of another might be made^f; but it is now said, that if in a deed the consideration of money be expressed, and afterwards the parties attempt to aver the consideration of blood, such averment cannot be made; for that it would be of mischievous consequences, and liable to the danger of perjury, which the *statute of frauds* intended to prevent, to suffer parol evidence to prove, that the consideration of blood and kindred was intended, contrary to that of money particularly expressed in the deed^g.

It appears from Roll's Abridgment^h, that if a man, in consideration of a certain sum paid by B., bargain and sell his lands to A. for life, remainder to C. in fee, this is good; for though A. and C. did not pay the consideration, yet it is evident, that it was paid upon their account; or that if the bargain and sale had been made to B. for life, with many remainders over, the consideration might well extend to those in remainder. Roll indeed puts the case of a covenant to stand seised *for money*; but such covenant would at this day operate as a bargain and sale.

^f 1 Co. 176. a. 2 Co. 76. P. W. 204.

a. b. ^h 2 Roll. Ab. 784. pl. 6,

^g Clarkson v. Hanway, 2 7. Winch. 61.

(4.) The words of transfer applicable to this conveyance are *bargain and sell*; but they are by no means necessary, nor material to its operation. If a man for a pecuniary consideration, by deed indented, *covenant to stand seised* to the use of another personⁱ, or *give and enfeoff*^k, or *alien, grant*, and demise to him^l; such deed, if properly inrolled, will operate as a bargain and sale. In Fox's case^m, it was said, that if it should appear from any clause in a deed, that it was the intention of the parties to pass land by a common law conveyance, there no use should be raised. But it has been expressly determined to the contrary. A. by deed indented, conveyed in the following words: "I the said A. have *given, granted, and confirmed* for a certain *piece of money, &c.*;" the *habendum* was to the feoffee, with warranty against A. and his heirs; and there was a *letter of attorney to make livery and seisin*. The deed was *inrolled* within one month after the making of it; and the attorney, after four months from the delivery, made livery of seisin. It was the opinion of the whole court, that the conveyance should operate as a *bargain and sale*ⁿ.

ⁱ 8 Co. 94. a. 7 Co. 40. in Bedell's case, 1 Vent. 138.

^k 3 Leon. 16.

^l 8 Co. 94. a. See Taylor v. Vale, Cro. El. 166.

^m 8 Co. 94.

ⁿ 3 Leon. 16. ca. 39. Vide ante 40.

The operative words.

If a term of years be created, in consideration of a sum of money, by the words *demise*, *grant*, *bargain*, and *sell*^c, or by the words *demise* and *grant*^d only; the grantee is at liberty to accept of the conveyance as a demise at common law, or as a bargain and sale. But it is said, that when a conveyance may take effect either at the common law, or under the statute of uses, it shall operate at the common law, unless the intention of the parties appear to the contrary; therefore if it be intended, that a term of years should be created by bargain and sale, the words *bargain and sell* only, should be applied to the transfer, for the purpose of avoiding any uncertainty as to the operation of the deed.

Who may convey by bargain and sale.

(5.) There must be a use, and a seisin to serve it, in every bargain and sale; and it must follow, that a person, incapable of standing seised to a use, cannot transfer lands by this conveyance^e. But an exception to this rule appears to have been attempted in favour of a corporation in the case of *Holland v. Boins*^f. In that case it was said, that though a corporation could not stand seised to a use, yet it might *charge* its own posses-

^c Heyward's case, 2 Co. 35.

^d See 1 Mod. 262, 263. 2 Mod. 252. Barker v. Keat.

^e See Gilb. Uses, 285. Cro. Jac. 50.

^f 2 Leon. 121. 3 Leon. 175.

sions with a use ; a distinction certainly incompatible with a fundamental rule in the construction of uses ; that the use is not annexed to, nor chargeable upon, the land. It is remarkable, that this very notion of *charging* the land with a use was considered in the celebrated case of *Chudleigh* ; and it was there mentioned as an *absurdity*^g, because, if adopted, it would have the effect of enabling an alien, the king, a corporation, the lord by escheat, &c. to stand seised to uses. However, to prevent any serious consequences, which may arise from the determination in the case of *Holland and Boins*, it is usual in practice to make a corporation convey either by feoffment with livery, or by lease and release, with an actual entry by the lessee for a year.

Who may convey by bargain and sale.

(6.) All corporeal hereditaments, of which the bargainor has a *seisin*, and all incorporeal hereditaments in *actual existence*, may be conveyed by bargain and sale ; because they may be limited to uses^h. So a trust declared upon a legal estate, and an equity of redemption, may be transferred by this conveyanceⁱ.

What property may be conveyed by bargain and sale.

^g See 1 Co. 127. a.

^h See ante, 1 vol. 107. and ante tit. Grants, sec. (1.)

ⁱ See *Oldin v. Samborn*,

2 Atk. 15. It has been holden, that the word *seisin* is applicable to a trust estate. See *Shrapnell v. Vernon*, 2 Bro. 268. 272.

What property
may be convey-
ed by bargain
and sale.

A man seised in fee may convey by bargain and sale for a term of years; but no chattel interest already created can be transferred by bargain and sale^k; because the statute requires a seisin to serve uses, and the owner of a chattel interest can only have a *possession*^l.

No use can be
limited upon
the estate of
the bargainee;
nor any *future*
use out of the
seisin of the
bargainor.

(7.) As no use can be limited to arise out of a use, it follows, from the above description of this conveyance, that a use cannot be limited upon the legal estate of the bargainee, so as to be executed by the statute^m. Neither can there be a *scintilla juris* or possibility of seisin remaining in the bargainor, after the bargain and sale, to serve a use limited upon a future event; because the pecuniary consideration paid, or supposed to be paid, by or on account of the bargainee, and which constitutes the foundation of the bargain and sale, appropriates the use exclusively for his benefit. The limitation of the use to the bargainee is a consequence arising from the payment of the money; and beyond that limitation the original consideration and contract do not extend. Therefore if there be a bargain and sale for the life of the bargainee, with a power for him to make leases, a lease

^k Gilb. Uses, 286.

^m See Tyrrell's case, Dy.

^l Popl. 76. See ante, 1 vol. 260. and ante tit. Feoff. sec. (9.) 3. 155. a. 1 And. 37. 1 Leon. 148.

made under that power cannot operate as an appointment of the use of the lesseeⁿ.

No use can be limited upon the estate of the bargainee; nor any future use out of the seisin of the bargainor.

A. conveyed by bargain and sale to B. and his heirs, upon condition, that if A. paid a certain sum to B., he might re-enter, and thereupon stand seised to the use of himself and his heirs, until he attempted to alien without the consent of B., and then to the use of B. and his heirs; and levied a fine to those uses. A. paid the money, entered, and conveyed the land without B.'s consent. It was said, that no use could arise to B. upon the alienation; because the *bargainor*, entering for a condition broken, was in of his old use, and could stand seised to no other^o.

But it should seem, that a covenant may be contained in a bargain and sale, on the part of the bargainee, which will raise a use out of his legal estate upon a future event. Thus if a bargainee covenant, that upon payment of a sum to him he will stand seised to the use of the bargainor and his heirs; the payment of the money will, it should seem, raise the use^p. But in this case, the original bargain and sale, and the covenant contained in it, must be considered as two conveyances^q,

ⁿ Poph. 81. See also 2 Roll. 260. Cro. J. 181.

^p See Moor, 35, pl. 115. Dalis, 38.

^o Holloway v. Pollard, Moor, 761.

^q Vide 2 Roll. Ab. 786. (M.)

No use can be limited upon the estate of the bargainee; nor any *future* use out of the seisin of the bargainor.

Of the operation of a bargain and sale by tenant in tail or for life.

founded upon distinct pecuniary considerations; and, consequently, I conceive, there should be two inrollments.

(8.) A bargain and sale is one of those harmless conveyances, which operate merely upon what the grantor may lawfully convey. It therefore cannot work a discontinuance^r, create a forfeiture^s, nor destroy contingent remainders dependant upon a particular estate^t. But it is settled, that if a tenant in tail convey in fee by bargain and sale, the bargainee has a base fee determinable upon the death of tenant in tail by the entry of the issue^u.

Ceremonies required by the statute of inrollments.

(9.) The statute of inrollments requires, that the bargain and sale should be by deed indented^w; and that the inrollment of the deed should be in *parchment*^x within six *lunar*^y months from the *date*^z, if the deed have a date; but if not, then from the *delivery*^a. The inrollment may be made either upon the day of the date^b, or upon the last

^r Gilb. Uses, 297. Co. Litt. 332. b. Salk. 619. See 1 Atk. 2.

^s Gilb. Uses, 102. See sir William Pelham's case, 4 Leon. 123.

^t Gilb. Uses, 140. Fearne, 472. 4th edit. Hard. 416.

^u Seymour's case, 10 Co. 95. Machill v. Clark, 2

See 3 Leon. 16, 17.

^x 2 Inst. 673. Dy. 218.

^y 2 Inst. 674. Shep. T. 223.

^z Ibid.

^a Ibid. Hob. 140.

^b 2 Inst. 674.

day of the six months, reckoning the day of the date *exclusively*^c.

Ceremonies required by the statute of inrollments.

(10.) The legal estate is vested in the bargainee by the statute of uses upon the execution of the deed; but the statute of inrollments obstructs the operation of the conveyance, until it be inrolled. The inrollment, however, has, for most purposes, a relation to the delivery of the deed^d: and thereby avoids all mesne incumbrances^e, and conveyances^f made by the *bargainor* between the delivery and inrollment. A bargainee before inrollment may be a good tenant to the *præcipe* for suffering a recovery^g; and if he die,

Of the relation of the inrollment to the delivery.

^c Thomas v. Popham, Dy. 218.

^d 2 Inst. 674. But in Brook's Reading upon the Statute of Limitations, 48. it is said, "That a man sells his land by indenture after the statute, and before the inrollment the vendor is attainted of felony, committed after the bargain and before the inrollment; and after the deed is inrolled, within six months the lord enters for escheat, the vendee doth ouster him, and declares of a seisin by 60 years, the lord may re-enter and retain, notwithstanding the statute; because that the land is not vested in the vendee, until inrollment, and a matter of

"record shall not have relation beyond the teste, and mesne acts vested shall not be divested: and it seemeth that this statute of limitations doth not take away the right nor entry of none of his own proper seisin, but only his action, prescription, title, and claim, of the seisin of his ancestors and predecessors; and if the vendor die before inrollment the lord shall have the ward."

^e Mullery v. Jennings, 2 Inst. 674. See Flower v. Baldwin, Cro. Car. 217.

^f Thomas v. Popham, Dy. 218. See Moor, 41. 4 Co. 71. a.

^g 2 Inst. 675. Owen, 70.

Of the relation
of the inroll-
ment to the de-
livery.

his wife shall have dower, in case the deed be afterwards inrolled^h; but not so as to the wife of the *bargainor*ⁱ. If there be two joint tenants, and one of them bargain and sell the estate in fee, and then the other die before the inrollment; only a moiety shall pass to the bargainee, though the deed be afterwards inrolled^k; and though the words of the bargain and sale comprise the whole estate^l. So, if a bargain and sale be made of a manor with an advowson appendant, and the church become void before the inrollment, the bargainee shall have the presentment^m.

The bargainee of a reversion shall have the rent incurred between the delivery and inrollment of the deedⁿ: but if the rent be paid by the tenant to the bargainor, the payment is lawful, and the bargainor is not compellable at law to account for it^o. So if a bargainee grant a rent before inrollment, it is a good grant, if the deed be afterwards inrolled^p.

^h Cro. Car. 217. cont. Shep. T. 226. Ow. 70. 150.

ⁱ Shep. T. 227. Cro. Car. 569.

^k Co. Litt. 186. a. Cro. Car. 217. 569. Bro. Inr. pl. 9.

^l Ow. 70.

^m Cro. Car. 217. See 2

Buls. 8, 9.

ⁿ Latch. 157. 1 Sid. 310.

^o Ow. 150. 69. Dy. 218. Godb. 156.

^p Cro. Car. 217.

A bargainee may receive a release from a stranger before inrollment^r; but it is said, that if a bargain and sale be made to A. and B. and their heirs, and A. release to B. before inrollment, such release is void^s. So if a disseisor bargain and sell the lands, and the disseisee release to the bargainee before inrollment, the release is unoperative^t; but a release to the bargainor will, in such case, enure for the benefit of the bargaineeⁿ.

Of the relation of the inrollment to the delivery.

But if a *bargainee* before inrollment convey the estate by bargain and sale to another person, and then inroll the first deed; the second bargain and sale is void, though it should afterwards be inrolled^w. So a lease made by a bargainee before inrollment is not valid^x.

Though the inrollment has a relation to the delivery of the deed, and thereby avoids all mesne incumbrances and conveyances made by the *bargainor*; yet it does not divest any estate lawfully settled in the bargainee in the interim^y; therefore if a feoffment be made, or fine levied by the bargainor to the

^r 2 Inst. 675.

^s Shep. T. 227.

^t 1 Roll. Rep. 425.

ⁿ Mockett's case, Shep. T. 227.

^w Sir Robert Barker's case, Shep. T. 227. Bel-
lingham v. Alsop, Cro. Jac.

52. 409. See Perry v. Bowes, 1 Vent. 360. T. Jones, 169.

^x Cro. Car. 110. Carth. 178.

^y 4 Co. 71. a. Hynd's case.

Of the relation
of the inroll-
ment to the de-
livery.

bargainee before inrollment; he shall take by the feoffment, or fine, and not by the bargain and sale^z.

(11.) By a provision in the statute of inrollments, that act does not extend to hereditaments lying within any city, borough, or town corporate, wherein the mayors, recorders, or other officers, have authority to inroll deeds. A bargain and sale therefore of such hereditaments operates to all purposes from the date or delivery of the deed^a.

(2.) By the statute 10 Ann. c. 18. s. 3. after reciting, that “for supplying a failure
“in pleading or deriving the title to lands,
“tenements, or hereditaments, conveyed by
“deeds of bargain and sale, indented and in-
“rolled according to the statute made in the
“27th year of the reign of king Henry the
“Eighth, for inrollment of bargains and
“sales, where the original indentures of bar-
“gain and sale to be showed forth or pro-
“duced, are wanting, which often happens,
“especially where divers lands, tenements,
“or hereditaments are comprised in the same
“indenture, and afterwards derived to dif-
“ferent persons; be it further enacted, by

^z 2 Inst. 671, 672. Shep. T. 226. Northumberland's case, Moor, 337. Popham's case, 4 Leon. 4. Ante, tit.

Grant, sec. 2.

^a See Chibborne's case, Dy. 229. Darly v. Bois, Yelv. 123.

“ the authority aforesaid, that where in any
“ declaration, avowry, bar, replication, or
“ other pleading whatsoever, any such inden-
“ ture of bargain and sale inrolled, shall be
“ pleaded with a *profert in curia*, or offer to
“ produce the same, the person or persons so
“ pleading, shall and may produce and show
“ forth, and be suffered and allowed to pro-
“ duce and show forth, by the authority of
“ this act, to answer such profert, as well
“ against her majesty, her heirs and succes-
“ sors, as against any other person or per-
“ sons, a copy of the inrollment of such bar-
“ gain and sale; and such copy examined
“ with the inrollment, and signed by a proper
“ officer, having the custody of such inroll-
“ ment, and proved upon oath to be a true
“ copy so examined and signed, shall be of
“ the same force and effect, to all intents and
“ constructions of law, as the said indentures
“ of bargain and sale were and should be of,
“ if the same were in such case produced and
“ shown forth.”

Of the relation
of the inroll-
ment to the de-
livery

LEASE AND RELEASE.

Description of
a release at the
common law
by way of en-
largement.

(1.) A RELEASE, enlarging an estate already created, is a conveyance derived wholly from the common law; and it requires, in all cases, privity of estate between the releasor and releasee^a. Thus if land be in the possession of a lessee at will^b, for life, or years^c, there exists a privity of estate between him and the lessor; and the latter may execute a release of his estate either to the lessee himself, or to his assignee^d. So the person seized of the inheritance in reversion or remainder, may release it to the tenant of the freehold; whether such tenant be by the curtesy or in dower^e, or for his own life, or for that of another^f. But a release of this kind will not operate upon the possession of an under-lessee^g, or of a tenant at sufferance^h, by *elegit*, or statute merchantⁱ.

^a Co. Litt. 272. b.

^b Litt. sec. 460.

^c Ibid. 465.

^d 2 Roll. Ab. 401. pl. 9.
Dy. 4. pl. 2.

^e 2 Roll. Ab. 401. pl. 8.

^f Co. Litt. 273. b.

^g Co. Litt. 273. a. Dy.

4. b. pl. 2.

^h Co. Litt. 270. a. 271. a.

ⁱ 2 Roll. Ab. 401. pl. 12.

Co. Litt. 273. b. Shep. T.
324.

When no estate precedes the lesser estate intended to be enlarged by the release, *an actual possession* is necessary at the common law to the operation of the release^k. But if there be tenant for life, remainder for life, with the reversion in fee; the person in reversion may release to him in remainder for life^l; for though he has no possession, yet he has an estate actually vested in him.

Description of a release at the common law by way of enlargement.

(2.) The release, just described, was a *secondary* conveyance, operating upon an estate originally created without any reference to it. But in very early periods of our history, it was not unusual to execute a lease for two or three years, completed by the actual entry of the lessee, for the express purpose of enabling him to receive a release of the inheritance; and which was accordingly made to him within a short time afterwards. The lease and release, executed in this manner, transferred the freehold of the releasor as effectually, as if it had been conveyed by fine or feoffment. Whether the lesser estate were merged, or whether it were merely enlarged by the accession of the greater; it certainly did not exist separately from it. Thus a lease for years, and a release founded upon it, had the operation of *one* conveyance; and so far

Introduction and nature of the conveyance by lease and release.

^k Co. Litt. 270. a. Litt. sec. 459.

^l 2 Roll. Ab. 400. pl. 4, 5. Co. Litt. 270. a.

Introduction
and nature of
the conveyance
by lease and re-
lease.

back as the reign of Henry the Fourth, they are considered as equivalent to a feoffment in passing the freehold^m. In the Year Book 21 Ed. 4. 24. the conveyance by lease and release is expressly mentioned.

An entry by the lessee for years was necessary to perfect his lease at the common law. He could not receive a release, until he had acquired the actual possession. It is therefore probable, that the conveyance by lease and release was not frequently adopted before the statute of uses; because it was nearly as inconvenient, and not so powerful in its operation, as a feoffment with livery. But soon after that statute, a conveyance, differing only from the *lease and release* at common law in the manner of creating the previous estate for a year, but retaining the same name, derived from the same principles, and operating in the same manner, was introduced, as it is saidⁿ, by Serjeant Moore; a conveyance, which has almost wholly superseded that by feoffment.

A bargain and sale being made for one year upon a pecuniary consideration, the legal estate is immediately vested in the bargainee by the statute of uses. This bargain and sale

^m See Year Book 11 143. pl. 4. and note.
Hen. 4. 33. and also 5 Vin.

ⁿ See 2 Black. Com. 339.

does not require *inrollment*^s under the statute 27 Hen. 3. c. 16.; and it is now settled beyond controversy, that the estate, vested in the bargainee upon the execution of the deed, is capable of receiving a release of the reversion before or without an *actual entry* by him^t. A release, generally dated the day after the bargain and sale, is accordingly made; and thus an estate of freehold is transferred without entry, inrollment, or livery of seisin.

Introduction and nature of the conveyance by lease and release.

(3.) It is immaterial to the operation of the *release*, whether the previous estate for a year be created by a bargain and sale under the statute of uses, or by a lease at common law, perfected by the entry of the lessee. In either case the conveyance operates by *transmutation of possession*. It transfers a *seisin* to the releasee; and if the use be declared to him, he takes an estate not by virtue of the statute of uses, but in the course of possession at the common law^u. But if the use be declared to any *other* person or persons, then it is executed by the statute; and it is now usual to make settlements of freehold estates by lease and release; in which the limitations of uses are frequently various and intricate.

It operates by transmutation of possession.

^s 2 Co. 36. a. 8 Co. 94. a. of Mr. Booth, 2 vol. of Cases
^t Cro. Car. 110. Cro. Jac. and Op. 281. 289. See 1
 604. Carter, 66. vol. 91, 92.

^u See an excellent opinion

Who may convey by it.

(4.) When the release is founded upon a bargain and sale for a year, it is necessary, that the person making the conveyance, should be capable of standing seised to a use. But if the releasor be incapable of standing seised to a use, then the estate for a year should be created by a lease at common law, accompanied by an actual entry on the part of the lessee.

Operation of a lease and release.

(5.) The conveyance by lease and release, like a bargain and sale, does not work a discontinuance^w, nor create a forfeiture^x: neither can it destroy contingent remainders^y.

Whether there can be a resulting use upon a lease and release.

(6.) It has been doubted, whether there can be a *resulting use* in fee upon a conveyance by lease and release.

H. brought covenant as assignee of a reversion, and showed that the lessor, in consideration of five shillings, bargained and sold to him for a year, and afterwards released to him and his heirs, *virtute quarundam indentur' bargainie venditionis et relaxationis, necnon vigore statuti de usibus*, &c. he was seised in fee; and it was objected, that the use must be intended to be to the *releasor* and his heirs,

^w Litt. s. 598. 606.

^x Litt. s. 600.

^y See Fearn, 473. 4th ed.

because no consideration of the release, nor express use, appeared by the pleading².

Whether there can be a resulting use upon a lease and release.

It was argued in this case³, that there could be no resulting use on a lease and release: that nothing passes to the lessee in possession, but by way of *enlargement* of his estate; that it does not operate to give a new estate of the reversion, but to increase the estate in possession, according to the words of the release: that if the release enure only to enlarge the estate, the interest enlarged must be to the use of the lessee, or it cannot be said to be an increase of it: that if the practice had not prevailed to the contrary, it were very odd to limit the use of a release to any but the lessee; for which reason it is, that we find it expressed in the clause in the lease, on which the lessor intends to build his release, that the intent of the lease was to pass an estate by release upon it, for the benefit or use of a third person:

That it would be absurd to say, that my conveyance should have no other operation but to extinguish or merge the estate, which the grantee has already, in order to have it brought back to me; and what need could there be of such a way? If the party had

² Shortridge v. Lamplugh, 2 Salk. 678. 7 Mod. 71. 2 Ld. Raym. 798.

³ 7 Mod. 74.

Whether there
can be a result-
ing use upon a
lease and re-
lease.

any such intent, it might soon be done by a surrender :

That if it had been expressed in the deed of release, that he had already made him a lease for *years*, and that for the enlargement of that estate he made the release, there could be no doubt, but that it would be to the use of the *releasee* ; and there is no difference between the cases, since this release, in its own nature, enures by way of enlargement : besides, here is also a valuable consideration ; for the lease and release being but *one* conveyance, the five shillings, expressed to be the consideration of the *lease*, shall be participated to the release ; and also the acceptance of the release is in its own nature a consideration ; for it implies an alteration of the estate of the lessee, which, to consent to, is a consideration moving from the lessee ; and the only motive of the lessee's parting with the old estate was to get a new one.

On the other side^b it was urged, that before the statute 27 H. 8. c. 10. if A. made a feoffment, levied a fine, or suffered a recovery without a use declared, and without any consideration, the feoffee, conuzee, and recoveror stood seised of the said lands to the use of

^b 2 Ld. Raym. 800.

A.: that since the statute of H. 8. the law as to this matter is not altered: for the said statute only intended to execute the use to the possession, and by that means to destroy the use; but it did not intend to make any other thing pass by the conveyance, than that which passed before: that there was the same reason, that the use should not pass in a *release* without any consideration, or express declaration, as in a feoffment, fine, and recovery:

Whether there can be a resulting use upon a lease and release.

To the objection, that this release enured by way of enlargement of the lease for a year, and therefore would participate of the consideration of it, and that the lease and release made but *one* conveyance, it was answered, that though the lease and release made but one conveyance as to the passing of the fee, yet they were in truth *distinct* conveyances, and had different operations, the one by the statute of uses, and the other by the common law: that as to what is said, that the release enures by way of enlargement of the estate of the lessee, it is true, that it gives him a greater estate than he had before; but that notwithstanding it destroys the estate for years by *merger*; and it cannot participate of the consideration contained in the *lease*, which is perfectly distinct.

Whether there can be a resulting use upon a lease and release.

However, Holt, C. J. without considering the operation of the conveyance^c, maintained, that the manner of pleading the release as above, to the releasee, was good; and that if a *feoffment* be pleaded in the same manner, without showing the use or consideration, with an averment *virtute cujus* the feoffee was seised, the use shall be intended to be to the feoffee: and that was the form of pleading *before* the statute, and the statute has not altered, but rather confirmed, this manner of pleading.

Lord Hardwicke, in the case of *Lloyd v. Spillet*^d, considered the conveyance by lease and release exactly in the same light, as that by *feoffment* with respect to a resulting use; and though he held, that either an express declaration, or consideration however trifling, would carry a use to the releasee, yet the whole tenor of his argument gives reason to believe, that he took it to be a settled point, that without the one or the other the use would result to the releasor^e.

Supposing a release to be made to a lessee for years, whose estate was not originally created with a view of receiving such release, there can be no doubt, that the releasee

^c See 2 Salk. 678.

^d Barn. Cha. Rep. 384.
2 Atk. 148.

^e See Lil. Con. 233. 1
Wood's Con. 776, and note,
2 Doug. 745.

would be entitled to the use and legal estate ; because the intention of the parties and the purposes of the release would be entirely frustrated, if the use should result to the releasor. But when a lease, or bargain and sale for a year, is made for the *express purpose* of receiving a release, they must be considered as *one* conveyance, operating by way of transmutation of the possession or seisin to the releasee ; and admitting, that the doctrine of resulting uses was introduced in order to regulate and carry into effect the *intention* of the parties, and that the payment of a pecuniary consideration, however inconsiderable, was a criterion of such intention, I cannot see how the conveyance by lease and release can in this respect differ from that by feoffment, fine, or recovery. In the above case of *Shortridge v. Lamplugh*, both *Holt* and *Powell* agreed^f, that if a particular use were limited on the release, the remainder would result. Why ? Because such construction would favour the *intention*. The notion of resulting uses was adopted for that very purpose.

(7.) It is necessary at the common law, that an *exchange* or a *partition* should be completed by an actual entry^g. But it is now usual to make an exchange by a bargain and sale for a year, and a release grounded upon

^f 7 Mod. 77.

^g See Co. Litt. 266. b.

Whether there can be a resulting use upon a lease and release.

it; and if joint-tenants or tenants in common concur in a conveyance by lease and release, and thereby transfer the entire seisin to the releasee, they may effectuate a partition by limiting the uses of the specific allotments. It is unnecessary to observe, that in all these cases the possession is executed by the statute without, or before, entry.

Where exchanges are effected by the means of powers operating under the statute of uses, there can be no implied right of entry on eviction, as on an exchange at common law, because the right of entry must be descendible to the heir, and not transmitted from cestuique use to cestuique use in succession; and the entry by cestuique use for life could not acquire for him a fee-simple as of his old estate.

It may be doubted, whether a proviso inserted in an exchange under power for shifting the use in case of eviction would not be void; for each party would take an estate subject to a springing use, which could not be defeated by the owners of the estate subject to it: and this would probably be considered too remote, and as amounting to a perpetuity. See 1 vol. 194, et seq.

AN

APPOINTMENT.

(1) WE must distinguish between an ap- Description of
an appoint-
ment. pointment and the declaration of a use. The latter is that original disposition of the use by the express consent of the parties, which prevents it from following any implied designation, which the rules of law might otherwise prescribe : but the former is a limitation of the use by a separate instrument derived from, and conformable to, a power reserved, or contained, in the original conveyance, by which the seisin to serve those uses is transferred. The limitation of uses thus made under the power must necessarily alter, abridge, or suspend the use previously declared upon such original conveyance. Such are the powers usually reserved in settlements of leasing, jointuring, selling, exchanging, and charging^b.

(2.) Every appointment, when made im- The nature of
the estate trans-
ferred by the
appointment. mediately to the appointee, must consequently

^b See ante, 1 vol. ch. 2. s. 5. (8.)

The nature of the estate transferred by the appointment.

vest the use or legal estate in him ; and therefore if A. in pursuance of a power limit an estate to B. to the use of C., the use to C. cannot be executed by the statute. But as the use, under an appointment, is served out of the original seisin of the feoffees or releasees to uses, it is capable of the same modifications, as the use declared upon the original conveyance. Suppose a feoffment or lease and release made to J. S. and his heirs, to such uses as A. B. shall appoint, and in default of and until appointment, to certain uses therein declared. A. B. in pursuance of his power, appoints, that J. S. and his heirs shall stand seised to the uses following ; viz. to the use of himself for life, remainder to trustees to preserve contingent remainders ; remainder to his first and other sons in tail. The use in this case will be executed in A. B., and the trustees to preserve, &c. immediately ; and in the sons, when they are born.

As to the necessity of reciting the power.

(3.) When a person may dispose of an estate either under a power of appointment, or as the absolute owner of it, it is necessary, if he wish to convey in pursuance of the appointment, that the power should be *recited* or *referred to* : but when a disposition cannot take effect but as an appointment or limitation of the use, then there is no absolute necessity that the appointer should notice the

power, nor convey in pursuance of itⁱ. Thus As to the necessity of reciting the power. if A. make a feoffment, levy a fine, suffer a recovery, or convey by lease and release to B. and his heirs to such uses, as A. shall by deed or will appoint, and in default of such appointment, to the use of A. in fee; as A. in this case may appoint the land, or dispose of it as the legal proprietor, if he make his will, and without *referring to* or *reciting* the power, devise the land generally, the will must take effect as a devise of the land, and not as a disposition of the use^k. Lord Coke, indeed, makes a distinction between a feoffment to *such uses as the feoffor shall by his last will appoint*, and *to the use of the feoffor's last will*; for with respect to the latter he says, that if the feoffor make his will *with reference* to the power, yet it shall take effect by virtue of the *devise*, and not as a limitation of the use^l.

(4.) The instrument, executing the appointment, must be accompanied with all the Of the instrument executing the power. ceremonies required by the power; such as sealing, signing, and the attestation of witnesses. The deed itself, being merely the limitation of a use served out of a seisin transferred by another deed, cannot be considered as an independent conveyance. It is

ⁱ See 12 Mod. 469. Andrews v. Emmot, 2 Bro. 297. Lawson v. Lawson, 3 Bro. 272.

^k Co. Litt. 111. b. 112. a. 6 Co. 18. a.

^l Har. Co. Litt. 112. a. n. 2. Moor, 280.

Of the instrument executing the power.

an instrument inapplicable to the transfer of property by a person conveying as the absolute proprietor. Yet an appointment may be, and frequently is, executed by a conveyance, which, if not expressly or impliedly referring to the power, would operate upon the legal estate. Thus if releasees to uses in pursuance, and by virtue, of a power of selling and exchanging, reserved to them, convey by *lease and release*; the conveyance shall operate as a disposition of the use: and in a case, where land was devised to B. for life, with a power to dispose of the fee to any of her children; it was determined, that a conveyance by lease and release by B. to the use of herself during her life, with remainder to the use of her children, was an effectual execution of the power^m. Appointments, however, made in this manner, are always informal.

Of the relation of the appointment to the original conveyance.

(5.) It is generally true, that a use limited by virtue of a power of appointment has relation to the conveyance, in which the power is containedⁿ. Therefore, if an estate be limited to the use of such persons as a purchaser shall appoint, and in default of appointment to the use of the purchaser and his heirs; until the purchaser exercise the

^m See *Tomlinson v. Dighton*, 1 P. W. 149.

Salk. 239.

ⁿ See 1 *Atk.* 560. note 2.

power, he is seised of a base and qualified fee, liable to be defeated by the execution of it; and if he die without making any appointment, his wife will be clearly entitled to her dower; but if he exercise his power, then a new use springs up, which entirely defeats the intermediate use limited in default of the appointment, and of course destroys the wife's right to dowerⁿ. So if an estate be conveyed to the use of A. for life, with many remainders over, and a power be reserved to A. to make leases, or a jointure upon an after-taken wife; when A. exercises his power it takes effect by way of limitation of a use, which entirely overreaches and takes precedence of the other uses interfering with it^o.

Of the relation of the appointment to the original conveyance.

Upon the same principle, if there be a limitation of a use to A. for life, and after his decease to such uses as B. shall appoint, who afterwards in A.'s lifetime appoints the use to the right heirs of A.; in this case it seems, that the limitation of the use to the right heirs of A. by virtue of the appointment unites with the life estate of A. so as to make the right heirs take by *descent*, and not by way of a contingent *remainder*^p. In cases

ⁿ Vide 1 vol. 154. et seq.; and see Maundrell v. Maundrell, 7 Ves. 567. 10 Ves. 246.

^o See 1 P. W. 246. and 1 vol. 165, et seq.

^p See Fearne, 99, 100. ed. 4.

Of the relation
of the appoint-
ment to the ori-
ginal convey-
ance.

like this, care should be taken to appoint the use immediately to the right heirs; therefore if B. make an appointment to C. in fee, to the use of the right heirs of A. ; the legal estate or use is vested in C. by the appointment, and the right heirs of A. take only an *equitable* estate or *trust*. In this case the *legal* estate for life of A. cannot be incorporated with the equitable one limited to his right heirs; and consequently the remainder to his right heirs is contingent.

In some cases, however, an appointment does not relate back in point of time to the instrument, by which it is created. Thus in the case of the duke of Marlborough v. lord Godolphin^a, where lord Sunderland by his will gave the interest of 30,000*l.* to his wife during her life, and after her decease the principal to be distributed among such of his children, and in such manner and proportion as she by any deed, or will, or instrument, or writing in nature of a will, should direct and appoint: she, by her will reciting the power, gave 15,000*l.* to lady Morpeth, and 2000*l.* to Mr. Spencer, who both died in the lifetime of the testatrix: the question was, whether the appointment had a relation back to the time of the death of lord Sunderland, when the instrument, which created the power, took

^a 2 Ves. 61.

effect; for if it had, then the legacies given to lady Morpeth and Mr. Spencer must be considered as having become vested in them during their lives. But lord Hardwicke said, that nothing vested in them during their lives, and consequently that nothing was transmissible to their representatives; because every person, claiming under the execution of a power, must claim not only according to the execution of the power, but according to the *nature* of the *instrument*, by which that power is executed; and therefore a *will*, in execution of such a power, being always *revocable*, it is not complete till the death of the testatrix^r.

Of the relation of the appointment to the original conveyance.

(6.) By virtue of a power of appointment a person may, in a certain degree, effectuate a remote limitation, which, if placed in the original deed, would be considered as tending to a perpetuity, and therefore void. Thus if there be a limitation to B. for life, who at that time has no son, with a *general* power reserved to him to limit the uses in remainder to such persons, as he shall appoint; here upon the birth of a son of the tenant for life, the use may be limited to such first son *for life*, remainder to his first and other sons in strict settlement; notwithstanding the persons, to whom the estates are appointed, were not in

Of appointments to unborn children.

Of appointments to unborn children.

existence at the time of the execution of the conveyance, in which the power is contained. But when the duke of Marlborough gave a power to trustees by his will, on the birth of the sons of the tenant for life, therein named, to revoke the uses limited to those sons *in tail*, and to limit the uses to such sons *for life*, remainder to the first and other sons of such sons severally and successively in tail male; it was holden, that this power, as it tended to a perpetuity, was void³. It should seem, however, that if an estate be settled to the use of B. for life, with a power of appointing to his children, he may afterwards appoint an estate *for life* to a child unborn at the time of the creation of the power, though he cannot extend such appointment to the children of such child⁴.

³ See 5 Bro. P. C. 592. vol. Cases and Opinions,

⁴ See Mr. Booth's op. 2 439.

COVENANT

TO STAND SEISED TO USES.



(1.) USES may be raised either upon a pecuniary consideration, or upon what is called a *good* consideration, which is that of blood or marriage. Whatever be the form of the conveyance creating and transferring a use upon the former consideration, it is a *bargain and sale*, and must be inrolled as such; but conveyances, raising uses upon, or by virtue of, the latter, are termed *covenants to stand seised*; and they are not within the words of the statute of inrollments, nor within the policy of it^a; because the consideration of blood and marriage is of a public nature.

Description of
a covenant to
stand seised.

(2.) The consideration of this conveyance is the foundation of it. The words *covenant to stand seised*, are therefore not absolutely necessary to its operation. A conveyance in

What words necessary.

^a See Plowd. 307.

What words necessary.

the form of, and void as a grant^b, feoffment^c, or release^d, may still take effect as a *covenant to stand seised*.

In practice, the following case occasionally occurs. An estate, being settled upon A. for life, with remainder to the use of trustees and their heirs during his life, in trust to support contingent remainders, with remainder to the first and every other son of A. successively in tail, with remainders over; A., in order to enable his eldest son to suffer a common recovery, by deed, not operating as a feoffment, bargain and sale, or lease and release, *surrenders* to his son his estate for life. This deed cannot operate in strictness as a *surrender*, on account of the intervening estate of the trustees; but it is the prevailing opinion of the profession, that it will operate as a covenant to stand seised; and the validity of many titles depends upon this construction^e.

Consideration.

(3.) It may be deemed an invariable rule, that uses can only be raised upon a covenant to stand seised in consideration of blood or

^b See 2 Vent. 150.

^c See Doe v. Simpson, 2 Wils. 22.

^d Brown v. Jones, 1 Atk. 188. Roe v. Tranmer, 2 Wils. 75.

^e See Crossing v. Scudamore, 1 Vent. 137. 2 Lev. 9. 22 Vin. 241. pl. 9. and Sympson v. Keyles, cited T. Raymond, 48, 49.

marriage^f. Thus affection for the heirs male Consideration.
of the covenantor, which he shall beget, brotherly love, and a desire that land should continue in the covenantor's name and blood, are all good to raise uses by way of covenant^g.

We are to observe, that if the consideration appear, though it be not particularly expressed, yet it is sufficient to raise a use upon this conveyance. Therefore if a man covenant to stand seised to the use of his wife, son, or cousin, without saying in consideration of the natural love, which he bears towards them, the covenant will raise the use^h. So if a man, in consideration of natural love to his eldest son, covenant to stand seised to the use of such eldest son in tail, and afterwards to the use of his younger son, the consideration extends to the latterⁱ. If a man, in consideration of affection to a son or brother, covenant to stand seised to the use of such son or brother, and his wife, the covenant raises the use for the wife^k; or if a man, in consideration that B. will marry his

^f 2 Black. Com. 333. Cart. 139. Moor, 505.

^g Plowd. 309. 2 Roll. Ab. 785. See the several cases collected in 22 Vin. 194. to 204. "If the use had been to the wife, *and* her heirs, it would have been good; for it could not be said, that the heirs of the wife were strangers

"to the consideration; for she bore all her heirs in herself." Per Raymond, C. J. in *Goodtitle v. Pettoe*, Fitzg. 299.

^h 7 Co. 40. in *Bedell's* case, 2 Wils. 22.

ⁱ Ibid. 2 Roll. Ab. 782. pl. 3.

^k 2 Roll. Ab. 784. pl. 3. 783. pl. 1

Consideration. daughter, covenant to stand seised to the use of both, it is sufficient to carry the use to them accordingly¹.

But if a covenant be made to stand seised to the use of a person, related to the covenantor by blood or marriage, and of a stranger, the whole use will vest in the relation^m. Yet it is said, in Sheppard's Touchstoneⁿ, that if I covenant with B. in consideration of the marriage of my son with his daughter, to stand seised to the use of R. (a stranger) for life, and after to the use of my son and his wife; in this case the use shall be executed in R. the stranger, because the remainder cannot be supported without a particular estate.

It seems, that if a man in consideration of money, and also of marriage, covenant to stand seised, the use will arise on the latter consideration only; and, consequently, if the marriage do not take effect, the use will never vest; though the money be actually paid^o. So a consideration consistent with the deed, or the considerations expressed in it, may be *averred*^p.

As to the considerations of friendship, long acquaintance, of being school-fellows,

¹ 2 Roll. Ab. 784. pl. 2.

^o Moor, 102.

4.

^p 7 Co. 40. a. 2 Roll. Ab.

^m Ibid. pl. 4.

790.

ⁿ Shep. T. 513.

affection to a natural son, and that the king Consideration. is head of the commonwealth; they will not raise uses by way of covenant to stand seised^a.

It is scarce necessary to notice, that if a man covenant to stand seised to the use of himself for life, with remainders over to his relations, and with a power for the tenant for life to make leases; this power is void, and cannot be exercised as the limitation of a use^r. So if a man should covenant to stand seised to the use of himself for life, with remainder to the use of trustees (who are not his relations), for the purpose of preserving contingent remainders, with remainder to his first and other sons in tail, &c. : no use would vest in the trustees; because the consideration does not extend to them. This is a principal reason why covenants to stand seised are fallen into disuse.

(4.) In order to render a covenant to stand seised effectual, the covenantor should A vested estate in the covenantor. have a vested estate in possession, reversion, or remainder. Therefore a covenant to stand seised of land, which the covenantor shall afterwards purchase, is void^s. It is said, that

^a See Plowd. 302. 2 Goodtitle v. Pettoe. Fitz-Roll. Ab. 783. Co. Litt. gib. 299.
123. n. 8. 2 Co. 15. a. b. * Moor, 342. Cro. El.
^r 2 Roll. Ab. 260. Cro. 401. 2 Roll. Ab. 790. pl.
Jac. 181. So as to a general power of appointment, 8.

A vested estate
in the cove-
nantor.

if a joint-tenant covenant to stand seised of the moiety of his companion after his death, it is void; although the covenantor survive¹.

The operation
of it.

(5.) This conveyance, when made by a tenant in tail, cannot produce a discontinuance; and when made by a tenant for life, will not create a forfeiture; neither will it destroy contingent remainders depending upon such life-estate.

¹ 2 Roll. Ab. 790. pl. 9.

FEOFFMENT.

THIS Indenture of three Parts, made this Feoffment with
general war-
ranty.
first day of February, in the year of our
Lord Christ one thousand seven hundred
and ninety-nine, and in the thirty-ninth year
of the reign of our sovereign Lord George
the Third, by the grace of God, of Great
Britain, France, and Ireland, king, defender
of the faith, &c. Between Andrew Akers of, Feoffor.
&c. of the first part, Benjamin Brown of, &c. Feoffee.
of the second part, and Charles Chivers of, Attorney to de-
liver seisin.
&c. of the third part; **witnesseth**, That in
consideration of the sum of £ of
lawful money of Great Britain to the said A.
Akers in hand paid by the said Benj. Brown
at or before the sealing and delivery of these
presents, the receipt of which said sum of
£ he the said A. Akers doth hereby
acknowledge, and of and from the same,
and every part thereof, doth acquit, release,

and discharge the said B. Brown, his heirs, executors, administrators, and assigns, and every of them, for ever by these presents; He the said A. Akers Hath granted, aliened, enfeoffed, and confirmed, and by these presents Doth grant, alien, enfeoff, and confirm unto the said Benjamin Brown, his heirs and assigns, All those pieces or parcels of land, &c. &c. And also all woods and underwoods, timber and other trees, mounds, hedges, ditches, fences, ways, paths, passages, water, water-courses, easements, advantages, and appurtenances to the said pieces or parcels of land and hereditaments, or any of them, or any part thereof, belonging or in any wise appertaining, or to or with the same, or any of them, or any part thereof, now or at any time heretofore usually held, occupied, or enjoyed, or accepted, deemed, taken, or known, as part, parcel, or member thereof; and all the estate, right, title, interest, property, claim, and demand whatsoever, both at law and in equity, of him the said Andrew Akers in, to, or out of the same, and every part thereof; **To have and to Hold** the said pieces or parcels of land, hereditaments, and other the premises hereby granted and enfeoffed, or intended so to be, with the appurtenances, unto the said Benjamin Brown, his heirs and assigns, to the only use and behoof of the said Benjamin Brown, his heirs and assigns, for ever. And the said Andrew Akers hath

Common words.

Habendum.

granted for himself, his heirs, executors, and assigns, That he the said Andrew Akers, and his heirs, all and every the said lands, hereditaments, and premises above granted and enfeoffed, or intended so to be, unto the said Benjamin Brown, his heirs and assigns, against him the said Andrew Akers, his heirs and assigns, and against all and every other person and persons whomsoever, shall and will warrant and for ever defend by these presents. And the said Andrew Akers hath nominated, constituted, and appointed, and by these presents doth nominate, constitute, and appoint the said Charles Chivers his true and lawful attorney, for him and in his name and stead, to enter into, and take full, quiet, and peaceable possession and seisin of, all and singular the above-mentioned premises, or some part thereof in the name of the whole, and then to deliver full, quiet, and peaceable possession and seisin of all and singular the premises, or some part thereof in the name of the whole, unto the said Benjamin Brown, or to his attorney in that behalf lawfully authorized, according to the form and effect, and true intent and meaning of these presents. In witness, &c.

General warranty.

Letter of attorney.

Be it Remembered, That on this day of in the year first within written, full and peaceable possession and seisin were had and taken by the within named Charles Chivers of the lands and hereditaments within mentioned to be granted and enfeoffed, and were in the name of the within mentioned Andrew Akers delivered by the said Chas. Chivers to the within named Benjamin Brown; **To Hold** the same unto the said Benjamin Brown, his heirs and assigns for ever, according to the form and effect, and true intent and meaning of the within written Indenture, in the presence of

A MODERN FEOFFMENT,

With COVENANT to LEVY a FINE.

THIS Indenture of five Parts, made this first day of May, in the year of our Lord one thousand eight hundred and thirteen, Between Andrew Akers of, &c. and Ann his wife, of the first part; Benjamin Brown of, &c. of the second part; Charles Chivers of, &c. of the third part; David Beacon of, &c. of the fourth part, and Evan Egan of, &c. of the fifth part.

Whereas the said Benjamin Brown hath contracted with the said Andrew Akers for the absolute purchase of the hereditaments hereinafter described and intended to be hereby granted and enfeoffed, and the inheritance thereof in fee-simple, free from incumbrances, at or for the price or sum of £

Now this Indenture Witnesseth, That in pursuance of the said recited contract, and in consideration of the sum of £ of lawful money of Great Britain to the said Andrew

Akers in hand paid by the said Benjamin Brown, at or before the sealing and delivery of these presents, the receipt of which said sum of £ he the said Andrew Akers doth hereby acknowledge, and of and from the same, and every part thereof, doth acquit, release, and discharge the said Benjamin Brown, his heirs, executors, administrators, and assigns, and every of them, for ever by these presents; they the said Andrew Akers, and Ann his wife, HAVE, and each of them HATH, granted, aliened, enfeoffed, and confirmed, and by these presents DO, and each of them Doth, grant, alien, enfeoff, and confirm unto the said Benjamin Brown and his heirs, **All** those pieces or parcels of land, &c. **And also** all woods, underwoods, timber and other trees, mounds, fences, hedges, ditches, paths, passages, waters, water-courses, easements, advantages, and appurtenances to the said pieces or parcels of land and hereditaments respectively belonging, or in any wise appertaining, or with the same, or any of them, or any part thereof, now, or at any time heretofore, usually held, occupied, or enjoyed, or accepted, reputed, deemed, taken, or known as part, parcel, or member thereof; **And** all the estate, right, title, interest, use, property, claim and demand whatsoever at law and in equity of the said Andrew Akers and Ann his wife, and each of them, in, to, and out of the same premises, and every part thereof; **And** all deeds, evi-

dences, and writings relating to, or in any wise concerning, the said pieces or parcels of land and hereditaments, or any part thereof, now in the custody or power of the said Andrew Akers, or which he can obtain, or procure, without suit at law or in equity: **To** Habendum. **have and to hold** the said pieces or parcels of land and hereditaments hereinbefore described, and expressed to be hereby granted and enfeoffed, with their rights, members, and appurtenances, unto the said Benjamin Brown and his heirs for ever; **Nevertheless, To** To uses to bar dower. the use of such person or persons, for such estate or estates, interest or interests, and to and for such intents and purposes, and subject to such powers, provisoes, declarations, and agreements, or without being so subject, and in such manner and form as the said Benjamin Brown by any deed or deeds, instrument or instruments, in writing, with or without power of revocation and new appointment, to be sealed and delivered by him, in the presence of, and attested by, two or more credible witnesses, shall from time to time or at any time direct, limit, or appoint; and in default of, and until such direction, limitation, or appointment, and as to such part and parts of the premises, of which there shall be no such direction, limitation, or appointment, or to which no such direction, limitation, or appointment shall extend; To the use of the said Benjamin Brown and his assigns during

the term of his natural life, without impeachment of waste; and from and after the determination of that estate by any means in his lifetime, To the use of the said Charles Chivers and his heirs, during the life of the said Benjamin Brown, In trust, nevertheless, for the said Benjamin Brown and his assigns; and from and after the determination of the estate, so limited in use to the said Charles Chivers and his heirs, during the life of the said Benjamin Brown, To the use of the said Benjamin Brown, his heirs and assigns for ever.

Covenant to
levy a fine.

And, for the consideration hereinbefore expressed, the said Andrew Akers doth hereby for himself, his heirs, executors, and administrators, covenant, promise, and agree to and with the said Benjamin Brown and his heirs, that they the said Andrew Akers, and Ann his wife, shall and will, at the costs and charges of the said A. Akers, his heirs, executors, or administrators, in or as of this present Easter Term or before the end of Trinity Term next ensuing, acknowledge and levy in due form of law in his Majesty's Court of Common Pleas at Westminster, before the justices of the same court, unto the said Benjamin Brown and his heirs, one or more fine or fines *sur conuzance de droit com ceo*, &c. with proclamations to be thereupon had and made according to the form of

the statute in that behalf made and provided, and the usual course of fines with proclamations for the assurance of lands in such cases used and accustomed, of the said pieces or parcels of land and hereditaments hereinbefore described, and expressed to be hereby granted and enfeoffed, with the appurtenances, by such descriptions as shall be sufficient to comprise and ascertain the same: **And** it is hereby agreed and declared between and by the said parties hereto, that the said fine or fines so as aforesaid, or in any other manner, or at any other time or times to be had, acknowledged, and levied, and also all other fines and common recoveries, conveyances, and assurances in the law whatsoever, already had, made, done, acknowledged, levied, suffered, and executed of the said pieces or parcels of land and hereditaments hereinbefore described, and expressed to be hereby granted and enfeoffed, or any part thereof, by or between the said parties to these presents, or any of them, or whereunto they, or any of them, are, or is, or shall or may be, party or privy, or parties or privies, shall be and enure, and shall be adjudged, deemed, construed, and taken to be and enure as to the said pieces or parcels of land and hereditaments, with the appurtenances, to, for, and upon the uses, trusts, intents, and purposes hereinbefore limited and expressed of and concerning the same.

Covenants for
the title.

And the said A. Akers doth hereby for himself, his heirs, executors, and administrators, covenant, promise, and agree to and with the said B. Brown, his appointees, heirs, and assigns, in manner following, (that is to say,) That (for and notwithstanding any act, deed, matter, or thing by him the said A. Akers, or any of his ancestors, heretofore made, done, permitted, or suffered to the contrary) he the said A. Akers now at the time of the sealing and delivery of these presents is lawfully, rightfully, and absolutely seised of the said pieces or parcels of land and hereditaments hereinbefore described and expressed to be hereby granted and enfeoffed for an estate of inheritance in fee-simple, without any manner of condition, contingent proviso, trust, power of revocation, or limitation of any new or other use or uses, or any restraint, cause, matter, or thing whatsoever, to alter, change, charge, revoke, make void, lessen, or determine the same estate; **And** that (for and notwithstanding any act, deed, matter, or thing as aforesaid) he the said Andrew Akers now at the time of the sealing and delivery of these presents, hath in himself good right, full power, and lawful and absolute authority to grant, alien, enfeoff, and confirm the said pieces or parcels of land and hereditaments with the appurtenances, unto the said Benjamin Brown and his heirs, in manner aforesaid, and ac-

according to the true intent and meaning of these presents; **And further**, That it shall and may be lawful for the said Benjamin Brown, his appointees, heirs, and assigns, from time to time, and at all times hereafter, peaceably and quietly to enter into and upon, and to have, hold, use, occupy, possess, and enjoy the said pieces or parcels of land and hereditaments, and to receive and take the rents, issues, and profits thereof, and of every part thereof, to and for his and their own use and benefit absolutely, without any let, suit, trouble, denial, eviction, ejection, interruption, or disturbance whatsoever, of, from, or by the said Andrew Akers or his heirs, or any person or persons lawfully or equitably claiming, or to claim, by, from, through, under, or in trust for him or them, or any of his ancestors; **And** that free and clear, and freely, clearly, and absolutely acquitted, exonerated, and discharged, or otherwise by the said Andrew Akers, his heirs, executors, or administrators, well and sufficiently saved, defended, kept harmless and indemnified of, from, and against all and all manner of former and other gifts, grants, bargains, sales, leases, mortgages, estates, titles, troubles, charges, and incumbrances whatsoever had, made, done, committed, or suffered by the said Andrew Akers or any of his ancestors, or any person or persons claiming, or to claim, by, from, through, under, or in trust for him, them, or any of them:

And moreover, That he the said Andrew Akers and his heirs, and every other person having, or lawfully or equitably claiming, or who shall or may have, or lawfully or equitably claim any estate, right, title, trust, or interest in, to, or out of the said pieces or parcels of land and hereditaments hereinbefore described, and expressed to be hereby granted and enfeoffed, or any of them, by, from, through, or under, or in trust for him or them, or any of his ancestors, shall and will from time to time, and at all times hereafter, upon every reasonable request, and at the proper costs and charges of the said Benjamin Brown, his appointees, heirs, or assigns, make, do, acknowledge, levy, suffer, and execute, or cause and procure to be made, done, acknowledged, levied, suffered, and executed, all such further and other lawful and reasonable acts, deeds, matters, and things, devices, conveyances, and assurances in the law, for the further, better, more perfectly and absolutely granting, conveying, and assuring the same pieces or parcels of land and hereditaments, and every part thereof, with appurtenances, unto and to the use of the said Benjamin Brown, his appointees, heirs, and assigns, or otherwise as he or they shall direct or appoint, as by the said Benjamin Brown, his appointees, heirs, or assigns, or his or their counsel in the law, shall be reasonably advised or devised and

required; so that no such further assurance contain or imply any further or other warranty or covenant than against the person or persons, who shall be required to make and execute the same, his, her, or their heirs, executors, and administrators' acts and deeds only; and so that the person or persons, who shall be required to make and execute any such further assurance or assurances, be not compelled nor compellable, for the making or doing thereof, to go or travel from his, her, or their dwelling or respective dwellings, or usual place or places of residence or abode.

And the said Andrew Akers hath nominated, constituted, and appointed, and by these presents doth nominate, constitute, and appoint the said David Deacon the true and lawful attorney of and for him the said Andrew Akers, and in his name and stead to enter into, and take full, quiet, and peaceable possession and seisin of, all and singular the said pieces or parcels of land and hereditaments, or of some part thereof, in the name of the whole, and then to deliver full, quiet, and peaceable possession and seisin of all and singular the same hereditaments, or some part thereof, in the name of the whole, unto the said Benjamin Brown, or to the said Evan Egan, his attorney hereinafter in that behalf lawfully authorized, according to the form

Appointment of
attorney to de-
liver seisin.

and effect and the true intent and meaning of these presents.

Appointment of
attorney to re-
ceive posses-
sion.

And the said Benjamin Brown hath nominated, constituted, and appointed, and by these presents doth nominate, constitute, and appoint, the said Evan Egan the true and lawful attorney of and for him the said Benjamin Brown, and in his name and stead to enter into and upon the said pieces or parcels of land and hereditaments, or some part thereof, in the name of the whole, and then to receive and take of and from the said Andrew Akers, or his said attorney, full, peaceable, and quiet possession and seisin of all and singular the said hereditaments, or of some part thereof, in the name of the whole: and such possession and seisin so taken, **To hold** to the uses aforesaid, according to the form and effect, and the true intent and meaning of these presents. In witness, &c.

GRANT.

GRANT of a **RENT-CHARGE** during the **Life** of the Grantor, with a **DEMISE** to a **Trustee** for **Years** for securing the same.

See statute 17
Geo. 3. c. 26.
which has been
repealed by the
statute, 53 Geo.
3. c. 141.

THIS Indenture of three parts, made the
day of in the thirty-ninth
year of thereign of our sovereign Lord George
the Third, &c. and in the year of our Lord
Christ one thousand seven hundred and nine-
ty-nine, Between Andrew Ashton of

in the county of Middlesex,
Esquire, of the first part, Benjamin Barton of
of the second

part, and Charles Cary of

of the third part: ~~Whereas~~ William Ashton, Recital of a will.
late of

deceased, in and by his last will and testament
in writing, duly executed and attested, bear-
ing date on or about the twenty-second day
of May, in the year one thousand seven hun-
dred and eighty-eight, did (amongst other

things) give and devise all and every his freehold messuages, lands, tenements, and hereditaments, situate, lying, and being in the several parishes of
and elsewhere in the county of

with the appurtenances, to the said Andrew Ashton and his assigns during the term of his natural life, without impeachment of waste, with divers remainders over; and the said testator thereby appointed Robert Richards, Esquire, sole executor of his said will, who on or about the twenty-second day of February, one thousand seven hundred and eighty-nine, duly proved the same in the prerogative court of Canterbury: **And whereas** the said Benjamin Barton hath contracted with the said Andrew Ashton for the absolute purchase of one clear annuity, or annual sum of £ , to be paid unto the said Benjamin Barton, his executors, administrators, and assigns, during the life of the said Andrew Ashton, free from taxes, and without any other deduction whatsoever, by equal quarterly payments on the days hereinafter mentioned; together with a proportional part of the said annuity, for the time, which at the decease of the said Andrew Ashton shall have elapsed of the quarterly payment thereof then growing due, and subject to the agreement hereinafter contained for the repurchase of the said annuity, at or for the price or sum of £ ; **And whereas**, for securing the payment

The contract
for the purchase.

of the said annuity or clear yearly sum of ^{Warrant of at-}
 £ , the said Andrew Ashton hath by a ^{torney.}
 certain warrant of attorney, bearing even
 date with these presents, authorized

and

gentlemen, two attornies of his Majesty's
 court of at
 Westminster, to confess judgment against
 him in the said court of

at the suit of the said Benjamin Barton in an
 action of debt for the sum of £ , and
 costs of suit: **And whereas** it was agreed,
 upon the treaty for the purchase of the said
 annuity, that for the further, better, and
 more effectually securing unto the said Ben-
 jamin Barton, his executors, administrators,
 and assigns, payment of the said annuity or
 clear yearly sum of £ , the same should
 be charged upon, and be issuing and payable
 out of all those the said messuages, lands,
 tenements, and hereditaments, late of the
 said testator William Ashton, situate, lying,
 and being in the said county of

and so devised by his said will as aforesaid,
 with their and every of their rights, members,
 and appurtenances; and that the same mes-
 suages, lands, tenements, and hereditaments
 should be demised to a trustee for a term of
 years, upon the trusts and in the manner
 hereinafter expressed and declared of and
 concerning the same: **And whereas** it was
 agreed upon the treaty for the purchase of the

The grant.

said annuity or yearly sum of £ that the costs and expenses attending the contract for the said annuity, and of preparing and executing the several instruments for securing the same, and of enrolling a memorial of such securities, should be borne and paid by the said Andrew Ashton; **Now this Indenture Witnesseth**, That in pursuance of the said recited agreement, and in consideration of the sum of £ of lawful money of Great Britain to the said Andrew Ashton in his own proper person in notes of the Governor and Company of the Bank of England, payable to bearer on demand, in hand well and truly paid by the said Benjamin Barton, in his own proper person, at or before the sealing and delivery of these presents, the receipt^a and payment of which said sum of £ he the said Andrew Ashton doth hereby acknowledge, and from the same and every part thereof doth acquit, release, and discharge the said Benjamin Barton, his executors, administrators, and assigns, and every of them, for ever by these presents, He the said Andrew Ashton Hath given, granted, and confirmed, and by these presents Doth give, grant, and confirm unto the said Benjamin Barton, his executors, administrators^b, and assigns, for and during the natural life of him the said Andrew Ashton, one annuity, or clear yearly rent of £

^a See Note A.^b See Note B.

of lawful money of Great Britain, to be yearly issuing, payable, going, had, received, and taken by him the said Benjamin Barton, his executors, administrators, and assigns, out of, and to be charged and chargeable upon, all those the said freehold messuages, lands, tenements, and hereditaments, late of the said testator William Ashton, situate, lying, and being in the several parishes of

and and each and every of them, and elsewhere in the said county of

with their and every of their rights, members, and appurtenances, and out of all other the messuages, lands, tenements, and hereditaments, in the county of

by the said will devised as aforesaid, or whereof or whereto he the said Andrew Ashton is under and by virtue of the said in part recited will, or otherwise, seised, possessed, or entitled for any estate or interest whatsoever; together with all and singular the rights, members, and appurtenances thereto belonging, or in any wise appertaining, and the remainder and remainders, yearly and other rents, issues, and profits of all and singular the premises: **To have, hold, receive, take,** Habendum. **and enjoy** the said annuity, clear yearly rent, or annual sum of £ and every part thereof, unto the said Benjamin Barton, his executors, administrators, and assigns, for and during the natural life of the said Andrew Ashton, to

be paid and payable to him the said Benjamin Barton, his executors, administrators, or assigns, at or in the common dining-hall in Lincoln's inn, in the said county of Middlesex, by equal quarterly payments, between the hours of ten and twelve of the clock in the forenoon of the several and respective days following, (that is to say)

Days of payment.

in each and every year, by even and equal portions, free from taxes, and without any other deduction whatsoever; together with a proportional part of the said annuity, or clear yearly sum of £ for the time, which at the decease of the said Andrew Ashton shall have elapsed of the quarterly payment thereof, then growing due; the first payment of the said annuity to begin and be made on the day of next ensuing the date of these presents. **Provided**

Power to dis-
train.

always, and it is hereby declared and agreed by and between the said parties hereto, and particularly the said Andrew Ashton, for himself, his heirs, executors, and administrators, doth hereby grant, covenant, and agree to and with the said Benjamin Barton, his executors, administrators, and assigns, that in case the said annuity, or yearly rent of £ , or any part thereof shall happen to be behind and unpaid by the space of fourteen days next over or after any of the said days or times hereby appointed for the payment thereof,

and whereon the same ought to be paid as aforesaid, then and in every such case, and so often as it shall so happen, it shall and may be lawful for the said Benjamin Barton, his executors, administrators, and assigns, into and upon the said messuages, tenements, lands, hereditaments, and premises so charged with the payment of the said annuity, or yearly rent of £ , or intended so to be as aforesaid, or into and upon any part thereof, to enter and distrain for the same annuity, or yearly rent of £ , and all arrears thereof; and the distress and distresses then and there found and taken to take, lead, drive, carry away, and impound, and the same in pound to detain and keep, until the same annuity, or yearly rent of £ and all arrears thereof, and all costs, charges, and expenses whatsoever, sustained, or occasioned by, or attending the making, taking, and keeping any such distress or distresses, shall be fully paid and satisfied; and in default of payment thereof, or of any part thereof, in due time after any such distress or distresses shall be made and taken, to appraise, sell, or dispose of such distress or distresses, or any part thereof, or otherwise to act therein according to the due course of law in like manner, as in cases of distress taken for non-payment of rent reserved upon common leases; To the intent, that thereby and therewith the said Benjamin Barton, his executors, administra-

tors, and assigns, shall and may be fully paid and satisfied the said annuity or yearly rent of £ and all arrears thereof, or so much thereof, as shall then be remaining due and unpaid, and all costs, charges, and expenses which shall be sustained or occasioned by the non-payment thereof. **Provided also,** and he the said Andrew Ashton, for himself, his heirs, executors, and administrators, doth hereby further covenant, grant, and agree to and with the said Benjamin Barton, his executors, administrators, and assigns, that in case the said annuity or yearly rent of £ or any part thereof, shall at any time or times happen to be behind and unpaid by the space of twenty-eight days next over, or after, any of the said days or times appointed for the payment thereof as aforesaid, then and in such case, and so often as it shall happen (although no formal or lawful demand thereof shall be made), it shall and may be lawful for the said Benjamin Barton, his executors, administrators, and assigns, into and upon all the said messuages, or tenements, lands, hereditaments, and premises hereby charged therewith as aforesaid, or into and upon any part thereof in the name of the whole, to enter, and the same to have, hold, and enjoy, and the rents, issues, and profits thereof, and of every part thereof, to receive and take to and for his and their own use and benefit, until he or they shall be thereby, or

Power of entry.

therewith, or otherwise, fully paid and satisfied the said annuity or yearly rent of £ and all arrears thereof, and also so much of the said annuity or yearly rent of £ as shall incur and grow due during such time as the said Benjamin Barton, his executors, administrators, or assigns, shall continue in possession of the said hereditaments and premises after such entry as aforesaid, and also all such loss, costs, charges, damages, and expenses, as shall be sustained or occasioned by reason or means of the non-payment of the said annuity or yearly rent-charge, or any part thereof, at or on the days or times hereinbefore appointed for the payment thereof (such possession, when taken, to be without impeachment of waste.) And the said Andrew Ashton, for himself, his heirs, ex-^{Covenant to pay the annuity.}ecutors, and administrators, doth hereby covenant, promise, and agree to and with the said Benjamin Barton, his executors, administrators, and assigns, that he the said Andrew Ashton shall and will well and truly pay, or cause to be paid, unto the said Benjamin Barton, his executors, administrators, or assigns, during the natural life of him the said Andrew Ashton, the said annuity or yearly rent of £ free from taxes, and without any other deduction whatsoever, at the place, days, or times, and in

manner and form hereinbefore expressed, and appointed for the payment thereof^d, according to the true intent and meaning of these presents; and also that the heirs, executors, or administrators of the said Andrew Ashton, shall and will, within ten days next after the decease of the said Andrew Ashton, well and truly pay, or cause to be paid, unto the said Benjamin Barton, his executors, administrators, or assigns, a proportional part of the same annuity, yearly rent, or annual sum of £ for the time, which, at the decease of the said Andrew Ashton, shall have elapsed, of the quarterly payment thereof, then growing due^e. **And this Indenture further Witnesseth**, that in further pursuance of the said agreement, and for the consideration hereinbefore expressed, and for the further, better, and more effectually securing the payment of the said annuity, yearly rent, or annual sum of £ , at or on the days or times and in the manner aforesaid, and also in consideration of the sum of ten shillings of lawful money of Great Britain to the said Andrew Ashton in hand paid by the said Charles Cary, at or before the sealing and delivery of these presents (the receipt whereof is hereby acknowledged), he the said Andrew Ashton, at the request, and by the direction and appointment of the

Demise to a trustee.

^d See Note D.

^e See Note E.

said Benjamin Barton (testified by his being a party to, and sealing and delivering these presents), hath granted, bargained, sold, and demised, and by these presents both grant, bargain, sell, and demise unto the said Charles Cary, his executors, administrators, and assigns, all those the said several messuages or tenements, lands, hereditaments, and premises with the appurtenances hereinbefore mentioned, and hereinbefore charged with the payment of the said annuity, yearly rent, or annual sum of £ , and all other the estates and hereditaments situate and being in the said county of , which he the said Andrew Ashton is under and by virtue of the said hereinbefore in part recited will or otherwise seised or possessed of, or intitled to, for any estate of inheritance, or for his life, or for any term or number of years, or otherwise howsoever; together with all and singular the rights, members, and appurtenances thereto respectively belonging, or in any wise appertaining; and the reversion and reversions, remainder and remainders, rents, issues, and profits of all and singular the said several hereditaments, and premises; To have and to hold the said messuages or tenements, lands, hereditaments, and premises hereby granted and demised, or expressed, or intended so to be, with the appurtenances, unto the said Charles Cary, his executors, administrators, and assigns, from

Demise to a trustee.

Habendum for ninety-nine years.

Upon trust.

the day next before the day of the date of these presents, for and during the term of ninety-nine years thence next ensuing, and fully to be complete and ended, without impeachment of waste; yielding and paying therefore yearly and every year, during the continuance of this demise, unto him the said Andrew Ashton the rent of one peppercorn (if the same shall be lawfully demanded); nevertheless, upon and for the trusts, intents, and purposes hereinafter expressed and declared of and concerning the same hereby demised premises, (that is to say :) Upon trust in the first place, to permit and suffer the said Andrew Ashton, and his assigns, to receive and take the yearly income, or the rents, issues, and profits of all the said hereby demised premises, with the appurtenances, or to have, hold, occupy, and enjoy the same, until default shall happen to be made of or in payment of the said annuity or yearly rent of £ or some part thereof, at or on the days or times, and in the manner herein before appointed for payment thereof; and upon this further trust, that in case the said annuity or yearly rent of £ or any part thereof, shall happen to be behind or unpaid by the space of thirty days next over or after any of the said days or times hereinbefore appointed for payment of the same, and whereon the same ought to be paid as aforesaid, then and so often, the said Charles Cary, his

executors, administrators, or assigns, shall and do, from to time, by and out of the annual rents, issues, and profits of the said messuages or tenements, hereditaments and premises, or any part thereof, or by demising, leasing, mortgaging, or selling the same hereditaments, or any part thereof, for all or any part of the said term of ninety-nine years therein, or by such other ways or means, as to him the said Charles Cary, his executors, administrators, or assigns, shall seem meet, raise and levy such sum and sums of money, as shall be sufficient to pay and satisfy the said annuity or yearly rent of £ or so much thereof, as shall from time to time happen to be in arrear and unpaid; together with all such loss, costs, charges, damages, and expenses whatsoever, as the said Charles Cary and Benjamin Barton, or either of them, their or either of their executors, administrators, or assigns, shall sustain, expend, or be put unto, for or by reason or means of the non-payment of the same annuity or yearly rent of £ or any part thereof, at the days and times, and in the manner hereinbefore appointed for payment thereof, and as the said Charles Cary, his executors, administrators, and assigns shall sustain or be put unto in and about the execution and performance of the trusts hereby declared; and shall and do pay and apply the monies arising thereby, or

Cesser of the
term.

therefrom, in or towards payment and satisfaction thereof accordingly; and shall and do pay to, or otherwise permit and suffer the said Andrew Ashton, and his assigns, to have, receive, and take the surplus of the said rents, issues, and profits of the said messuages or tenements, lands, hereditaments, and premises, after full payment and satisfaction of the said annuity or yearly rent of £ and all arrears thereof, and all such costs, charges, damages, and expenses as aforesaid, to and for his and their own use and benefit: Provided always, and it is hereby agreed and declared, that after the decease of the said Andrew Ashton, and full payment of the said annuity or yearly sum of £ and all arrears thereof to the said Benjamin Barton, his executors, administrators, and assigns, and all such costs, charges, damages, and expenses, as aforesaid, the said term of ninety-nine years hereby granted and demised of and in the premises, or so much thereof as shall not be disposed of under the trusts aforesaid, shall cease, determine, and be absolutely void. **And** it is hereby agreed and declared, between and by the said parties hereto, that the receipt or receipts, of the said Charles Cary, his executors, administrators, or assigns, shall be a sufficient discharge for any monies which shall come to his or their hands, by virtue of or under these presents, or upon the trusts aforesaid, unto the person or

persons paying the same monies, or for so much thereof as in such receipt or receipts shall be expressed to be received: and that the person or persons paying such monies, shall not, after obtaining such receipt or receipts for the same as aforesaid, be bound or obliged to see to the application of the same monies, nor be answerable for the loss, misapplication or non-application thereof; nor shall he or they be bound to ascertain or inquire into the necessity or propriety of any sale; mortgage, or other disposition, or the collection of rents and profits, which shall be made by the said Charles Cary, his executors, administrators, or assigns. And the said Andrew Ashton, for himself, his heirs, executors, and administrators, doth covenant, promise, and agree to and with the said Benjamin Barton, his executors, administrators, and assigns, and also separately to and with the said Charles Cary, his executors, administrators, and assigns, by these presents in manner and form following; (that is to say,) that he the said Andrew Ashton hath in himself good right, full power, and lawful and absolute authority to charge the said messuages or tenements, lands, hereditaments, and premises, and every part or parcel thereof, with the payment of the said annuity, yearly rent, or annual sum of £ in manner aforesaid; and to demise the same messuages or tenements, lands, hereditaments, and pre-

The grantor covenants, that he has good right to charge the premises;

and to demise

that the premises are and shall continue free from incumbrances ;

mises respectively to the said Charles Cary, his executors, administrators, and assigns, for and during the said term of ninety-nine years², upon and for the trusts, intents, and purposes hereinbefore mentioned, expressed, and declared of and concerning the same, and according to the true intent and meaning of these presents; and further, that all and singular the premises hereby demised now are and shall from time to time, and at all times hereafter, during the continuance of the said term of ninety-nine years, remain, continue, and be open to, and sufficient for, such distress and entries as aforesaid, of the said Benjamin Barton, his executors, administrators, and assigns, in case of non-payment to him or them of the said annuity, yearly rent, or annual sum of £ at the days or times, and in manner aforesaid; and that the said messuages or tenements, lands, hereditaments, and premises now are free and clear, and freely and clearly acquitted, exonerated, and discharged, and shall remain, continue, and be, during the said term hereby granted, well and sufficiently saved, defended, kept harmless, and indemnified by the said Andrew Ashton, his heirs, executors, or administrators, of, from, and against all and all manner of former and other gifts, grants,

² See as to an action upon Bradshaw's case, 9 Co. 60.
a covenant of this kind, b. Cro. Jac. 304.

bargains, sales, leases, mortgages, annuities, rents, dowers, right and title of dower, uses, trusts, wills, intails, recognizances, judgments, extents, executions, forfeitures, and of, from, and against all and singular other estates, titles, troubles, charges, and incumbrances, whatsoever, had, made, done, committed, executed, occasioned, or suffered, or to be had, made, done, committed, occasioned, or suffered by the said Andrew Ashton, or any other person or persons whomsoever^a. And moreover, that he the said Andrew Ashton, and every other person having, or lawfully or equitably claiming, or who shall or may have, or lawfully or equitably claim any estate, right, title, trust, or interest whatsoever, in, to, or out of the said messuages or tenements, lands, hereditaments, and premises hereinbefore mentioned and hereby demised, or intended so to be, or any of them, or any part thereof, shall and will, from time to time, and at all times^b during the life of him the said Andrew Ashton, upon every reasonable request^c of the said Benjamin Barton, his executors, administrators, or assigns, but proper costs and charges^d in the law of the said Andrew Ashton, make, do, acknowledge, levy, suffer, and execute, or

and for further assurance.

^a See Note F.

^b See 1 Roll. Ab. 441.

^c Ibid. 441. Styles, 242.
T. Jones, 195.

^d See Note G.

cause or procure to be made, done, acknowledged, levied, suffered, and executed, all such further and other lawful and reasonable acts, deeds, and things, devices, conveyances, and assurances in the law whatsoever, for the further, better, more perfectly and absolutely granting and securing the said annuity or yearly rent, or annual sum of £ to the said Benjamin Barton, his executors, administrators, and assigns, by and out of the premises, and every part thereof, for and during the continuance of the natural life of him the said Andrew Ashton, and also for the more effectually granting, demising, and assuring the same premises unto the said Charles Cary, his executors, administrators, and assigns, for and during all the then remainder of the said term of ninety-nine years, upon the trusts hereinbefore declared thereof, as by the said Benjamin Barton, his executors, administrators, or assigns, or his or their counsel in the law, shall be reasonably devised, or advised, and required. **And whereas** the judgment so to be confessed by the said in his Majesty's court of for the said sum of £ , and costs of suit as aforesaid, It is agreed shall be entered of record in the said court of as of

Recital of an agreement to enter up judgment, pursuant to the warrant of attorney.

Declaration that the judgment is intended to be a collateral security for payment of the annuity.

term now last past, or of some subsequent term: **Now this Indenture further Witnesseth,** and it is hereby agreed and declared between and by the said Andrew

Ashton and Benjamin Barton, that the said judgment is intended to be so entered up as aforesaid; and the said Benjamin Barton, his executors, administrators, and assigns, shall stand and be possessed thereof, and of all benefit and advantage arising, and to be had and taken thereby, as a collateral security only, and for the better and more effectually securing the payment of the said annuity, yearly rent, or annual sum of £ , to the said Benjamin Barton, his executors, administrators, and assigns, during the life of the said Andrew Ashton, at the several days or times, and in the manner hereinbefore appointed for payment thereof, and such proportional part thereof as aforesaid; and that no execution shall be issued or taken out upon the said judgment, unless and until some payment of the said annuity, or some part thereof, shall be in arrear for the space of twenty-one days next after some or one of the said days hereinbefore appointed for payment thereof, as aforesaid: Provided always, and it is hereby further agreed and declared between and by the said parties to these presents, that when and so often as the said annuity, yearly rent, or annual sum of £ , or some part thereof, shall be behind and unpaid by the space of twenty-one days next over or after any of the said days of payment hereinbefore mentioned, then and in such case, and so often as it shall so happen, it shall and may be lawful for the

said Benjamin Barton, his executors, administrators, or assigns, to sue out such execution or executions upon or by virtue of the said judgment, as he or they shall think fit, or be advised, for the recovery of the said arrears of the said annuity, yearly rent, or annual sum of £ , and all costs and charges, which he the said Benjamin Barton, his executors, administrators, or assigns, or any of them, shall bear, pay, sustain, or be put unto, for or by reason or means of the non-payment of the same, or any part thereof; and that it shall not be necessary for the said Benjamin Barton, his executors, administrators, or assigns, to revive, or cause the said judgment to be revived, or to do any act, matter, or thing to keep the same on foot, notwithstanding the same judgment shall have been entered of record for the space of one year, or upwards; and notwithstanding any rule or practice of the said court, in which the said judgment shall be entered on record, to the contrary; and that he the said Andrew Ashton, his heirs, executors, or administrators, shall not nor will have, take, or receive, or attempt by any ways or means to have, take, or receive any advantage for want of reviving or keeping the said judgment on foot: Nevertheless it is hereby agreed and declared, that after the decease of the said Andrew Ashton, and full payment of the said annuity, yearly rent, or annual sum of £ , and all

arrears thereof, together with such proportional part thereof as aforesaid, up to the day of the decease of him the said Andrew Ashton, and of all such costs, charges, damages, and expenses as aforesaid, the said Benjamin Barton, his executors, administrators, or assigns, shall and will, at the request, costs, and charges of the heirs, executors, or administrators of the said Andrew Ashton, acknowledge satisfaction of the said judgment on the record thereof in due form of law, or do any further or other reasonable act, matter, or thing that may be then required in regard thereto ; so that for the doing thereof he the said Benjamin Barton, his executors, administrators, or assigns, be not compelled nor compellable to travel from his or their place or places of abode. Provided always and it is hereby agreed and declared between and by the said parties hereto, and particularly the said Benjamin Barton, for himself, his heirs, executors, and administrators, doth hereby covenant, promise, and agree to and with the said Andrew Ashton, that in case the said Andrew Ashton shall at any time hereafter be minded or desirous of re-purchasing the said annuity, yearly rent, or annual sum of £ , and of such his mind or desire shall give unto the said Benjamin Barton, his executors, administrators, or assigns, or leave at his or their usual place of residence or abode, ten days' notice in writing, he the said

Benjamin Barton, his executors, administrators, or assigns, shall and will at the end of the said ten days, for which such notice shall be given as aforesaid, on receiving of and from the said Andrew Ashton all sums of money whatsoever, which shall be then due for, or on account of, the arrears of the said annuity, and also a proportional part thereof, from the last quarterly day of payment preceding such re-purchase, up to, and inclusive of, the day of re-purchasing the same; and all costs, charges, and expenses which the said Benjamin Barton, his executors, administrators, or assigns, shall have incurred, or been put unto, on account of the non-payment of the said annuity, accept, receive, and take the sum of £ as and in full for the re-purchase of the said annuity, yearly rent, or annual sum of £ hereinbefore granted as aforesaid; and upon receipt of the said sum of £ , and of all arrears of the said annuity, and of such proportional part thereof as aforesaid, and of all such costs, charges, and expenses as aforesaid, he the said Benjamin Barton, his executors, administrators, or assigns, and also the said Charles Cary, his executors, administrators, or assigns, shall and will, at the request, and proper costs and charges in the law, of the said Andrew Ashton, make, do, and execute every act, deed, thing, assignment, or assurance, which shall be necessary or advisable for the

releasing, assigning, vacating, and discharging as well the said annuity, or yearly rent of £ , as the said several securities given and executed for the payment thereof, as by the said Andrew Ashton, his executors, administrators, or assigns, or his or their counsel in the law, shall in that behalf be reasonably advised, or devised, and required ; so that for the doing thereof he the said Benjamin Barton, his executors, administrators, or assigns, or the said Charles Cary, his executors, administrators, or assigns, be not compelled or compellable to go or travel from his or their then usual place or places of abode^e. In witness, &c.

^e See Note H.

GRANT OF AN ADVOWSON.

THIS Indenture, bearing date the day of
 one thousand eight hundred and
 thirteen, and made between Abraham Auld
 of, &c. of the one part, and Benjamin Buxton
 of, &c. of the other part:

Whereas the said Abraham Auld hath
 contracted with the said Benjamin Buxton for
 the absolute sale to him of the advowson of
 the rectory of in the county of
 and the inheritance thereof in
 fee-simple, free from incumbrances, at or for
 the price or sum of £

Now this Indenture Witnesseth, that in
 pursuance of the said recited contract, and in
 consideration of the sum of £ of lawful
 money of Great Britain to the said Abraham
 Auld in hand paid by the said Benjamin
 Buxton, at or before the sealing and delivery
 of these presents, the receipt of which said
 sum of £ he the said Abraham Auld doth
 hereby acknowledge, and of and from the
 same, and every part thereof, doth acquit, re-

lease, and discharge the said Benjamin Buxton, his heirs, executors, administrators, and assigns, and every of them for ever, by these presents, the said Abraham Auld hath granted and confirmed, and by these presents doth grant and confirm unto the said Benjamin Buxton, his heirs, and assigns, all that the advowson, donation, right of patronage, and presentation of, in, and to the rectory and parish church of in the county of , with all and singular the rights, members, and appurtenances thereto belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders thereof, and all the estate, right, title, interest, trust, property, claim, and demand whatsoever at law and in equity of the said Abraham Auld, in, to, or out of the same advowson, and every part thereof; and all deeds, evidences, and writings relating to, or in any wise concerning the said advowson now in the custody or power of the said Abraham Auld, or which he can obtain or procure without suit at law or in equity:

To Have and to Hold the said advowson and premises hereby granted, or intended so to be, with the appurtenances, unto the said Benjamin Buxton and his heirs, to the use of the said Benjamin Buxton, his heirs and assigns for ever.

And the said A. Auld doth hereby for himself, his heirs, executors, and administrators, covenant, promise, and agree to and with the said B. Buxton, his heirs and assigns, in manner following; (that is to say,) That (for and notwithstanding any act, deed, matter, or thing by him the said A. Auld, at any time heretofore made, done, executed, permitted, or willingly or knowingly suffered to the contrary) he the said A. Auld now, at the time of the sealing and delivery of these presents, is lawfully, rightfully, and absolutely seised of the said advowson and premises expressed to be hereby granted, with the appurtenances, of a good, sure, perfect, lawful, absolute, and indefeasible estate of inheritance, in fee-simple, without any manner of condition, contingent proviso, trust, power of revocation, or limitation of any new or other use or uses, or any other restraint, cause, matter, or thing, to alter, change, charge, revoke, make void, alter, or determine the same estate;

And that (for and notwithstanding any such act, matter, or thing as aforesaid) he the said A. Auld, now, at the time of the sealing and delivery of these presents, hath in himself good right, full power, and lawful and absolute authority to grant the said advowson and premises unto the said B. Buxton, his heirs and assigns, in manner afore-

said, and according to the true intent and meaning of these presents ;

And also, that it shall be lawful for the said B. Buxton, his heirs and assigns, from time to time, and at all times hereafter, whenever the said church of shall or may, by the death, resignation, deprivation, cession, or change of the rector or incumbent thereof for the time being, or otherwise, happen to become vacant, to present some proper and qualified clerk to succeed to the said church, as the rector or parson thereof, and to do all other acts which appertain to the office of patron of the said rectory or church, without any let, suit, molestation, hindrance, interruption, or disturbance of, from, or by the said A. Auld or his heirs, or any person or persons claiming, or to claim, by, from, through, or under him, them, or any of them ;

And that free and clear, and freely, clearly, and absolutely acquitted, exonerated, and discharged, or otherwise by the said A. Auld, his heirs, executors, or administrators, or some or one of them, well and sufficiently saved, defended, kept harmless, and indemnified of, from, and against all and singular former and other gifts, grants, bargains, sales, mortgages, charges, and incumbrances whatsoever, had, made, done, executed, committed,

or suffered by the said A. Auld, or any person or persons claiming, or to claim, by, from, through, or under him ;

And, moreover, that he the said A. Auld, and his heirs, and every other person having, or lawfully or equitably claiming, or who shall or may have, or lawfully or equitably claim, any estate, right, title, or interest in, to, or out of the said advowson and premises, expressed to be hereby granted, by, from, or under him or them, shall and will from time to time, and at all times hereafter, upon every reasonable request, and at the proper costs and charges of the said B. Buxton, his heirs or assigns, make, do, acknowledge, levy, suffer, and execute, or cause and procure to be made, done, acknowledged, levied, suffered, and executed, all such further and other lawful and reasonable acts, deeds, matters, and things, devices, conveyances, and assurances in the law whatsoever, for the further, better, more perfectly and absolutely granting and assuring the same advowson and premises, with the appurtenances, unto, and to the use of, the said B. Buxton, his heirs and assigns, or otherwise, as he or they shall direct or appoint, as by the said B. Buxton, his heirs or assigns, or his or their counsel in the law, shall be reasonably advised or devised, and required ; so that such further assurance or assurances contain or imply no further or other

warranty or covenant, than against the person or persons who shall be required to make and execute the same, his, her, or their heirs, executors, and administrators' acts and deeds only ; and so that the person or persons, who shall be required to make and execute such further assurance or assurances, be not compelled nor compellable for the making or doing thereof, to go or travel from his, her, or their dwelling or respective dwellings, or usual place or places of residence or abode. In witness, &c.

taments hereinafter bargained and sold, or intended so to be, and for limiting and assuring the same, and the inheritance thereof in fee-simple, with the appurtenances, to the use of the said Daniel Den (party hereto), his heirs and assigns, for ever; and in consideration of the sum of five shillings of lawful money of Great Britain, to the said Daniel Den (party hereto) in hand paid by the said Edward East, at or before the sealing and delivery of these presents (the receipt whereof is hereby acknowledged), he the said Daniel Den (party hereto) hath granted, bargained, and sold, and by these presents doth grant, bargain, and sell unto the said Edward East, his heirs and assigns, all those messuages, &c. &c. together with all and singular edifices, buildings, barns, stables, orchards, gardens, yards, backsides, commons, timber and timber trees, woods and underwoods, and the ground and soil thereof, ways, paths, passages, waters, water-courses, profits, commodities, advantages, hereditaments, and appurtenances whatsoever, to the same messuages, lands, tenements, and hereditaments belonging, or in any wise appertaining, or to or with the same, or any of them, or any part thereof, now or at any time heretofore used, occupied, or enjoyed, or accepted, reputed, deemed, taken, or known as part or parcel thereof, or of any of them; and the reversion

and reversions, remainder and remainders and the rents, issues, and profits thereof; and every of them, and every part thereof; and all the estate, right, title, interest, property, claim, and demand whatsoever of him the said Daniel Den (party hereto), in and to the said messuages, lands, tenements, and hereditaments hereby bargained and sold, or intended so to be, and every of them, and every part thereof: To Have and To Hold the said messuages, lands, tenements, hereditaments, and other the premises hereby bargained and sold, or intended so to be, with their and every of their appurtenances, unto ^{to use of} the said Edward East, his heirs and assigns for ever, to the use of the said Edward East, his heirs and assigns for ever; to the intent and purpose that he the said Edward East may become a perfect tenant of the immediate freehold of the messuages, tenements, lands, hereditaments, and premises hereby bargained and sold, or intended so to be; to the end that one or more good and perfect common recovery or recoveries may be thereof had and suffered in manner hereinafter mentioned; for which purpose it is hereby agreed and declared between and by the said parties hereto, that it shall and may be lawful for the said Francis Foley, at the costs and charges of the said Daniel Den (party hereto), in or as of Easter term now

Habendum.

any ye ft. natl. lives of
of (but for life) & last

or some or person or
ent. for life/ his executor
ye end of ye present time
or in or as of any sale
to him

next ensuing, or some other subsequent term, to sue forth and prosecute out of his Majesty's High Court of Chancery, one or more writ or writs of entry, *sur disseisin en le post*, returnable and to be returned before his Majesty's justices of the Court of Common Pleas at Westminster, thereby demanding by apt and convenient names, qualities, number of acres, and other descriptions, the said messuages, lands, tenements, hereditaments, and premises, with the appurtenances, against the said Edward East; to which said writ or writs of entry the said Edward East shall appear gratis, either in his own person, or by his attorney in that behalf lawfully authorized, and vouch over to warranty the said Daniel Den (party hereto), who shall also appear gratis, either in his own proper person, or by his attorney in that behalf lawfully authorized, and enter into the warranty, and vouch over to warranty the common vouchee of the same court, who shall also appear gratis, and imparl, and after imparlance, make default, so that judgment may be thereupon had and given for the said Francis Foley to recover the said messuages, lands, tenements, hereditaments, and premises hereby bargained and sold, or intended so to be, against the said Edward East, and for the said Edward East to recover in value against the said Daniel Den (party hereto), and for the said

of age 40 et 41 et 42

to demand the by of 40
East 40. 41. or 42. writs
by barg. sold & conveyed
apt by apt. good suff. &
names of of messes qual
qualit. & desc. & took
be deemed necessary and f.
to pass 40 same - And
et East shall in his o
p. p. person only his atty.
lly authorized in the
thelf app. to 40 et 41
each of 40. 41. writs for
to warranty 40. 41. et 42
40. same on himself & imp
& then make default
40 judgment may be give
on 40 et 41 writ or each of
et 41 writs for 40 et 41 Foley
or 40 demandt or to re

+ 40 40 et 41 in shall
his own p. person or by h
attly or s. lly author. in y
bly appear gratis & freely
on 40 warranty of 40 et
just at 40 40 same upon
himself vouch over to wa
40. common touch of 40 et of
fr. 40 time being and 4
et. common touch shall
they, or app. gratis & fre
eater into 40 warranty of 4
et 41 & take 40 same. as
committed by mistake

ments, and premises, and every of them, and every part thereof, to and for the only use and behoof of the said Daniel Den (party hereto), his heirs and assigns, for ever; and to and for no other use, intent, or purpose whatsoever. In witness, &c.

etc. in ye meane tyme subgt shal to ye same powers & priviledges also subgt without prejudice to ye or uses chys testr wh are line to commence take effect antecedent to ye testr fait by ye testr of rele & settlent limited to ye reason of ye body of ye testr by ye testr his wife & also to ye trust declared of ye same antest In the use of such person & for such estate & for such use & purpose for such ends into & upon subgt to such powers of revocacion & new appyntment for powers pious condones & trustors & devisions & gifts as ye testr &c. shal at any time or from to & during the tyme it lies by any deed or to be read & deliv by in ye presence of 1. 2. or more credible wit or & attested by ye same wit or witts shall fully & truly limit & appnt & in dft of such de & And so for as any such diron or if incomplete shall not extend & in ye meane tyme until such diron or shall be made In ye use of ye testr & ye heirs of his body & his heirs and for dft of such use In the use of ye testr &c. his heirs & assigns & to for or upon no other use trust intent or purpose whatsoever

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THIS Indenture made &c. Between

Gross of _____ in the
of Middlesex Esquire of the one p

ments, advantages, hereditaments, and appurtenances whatsoever, to the said messuages or tenements, lands and hereditaments, belonging, or in any wise appertaining, or accepted, reputed, taken, or known as part, parcel, or member thereof, and the reversion and reversions, remainder and remainders, rents, issues, and profits of the premises, and of every part thereof: **To Have and To Hold** the said messuages, lands, tenements, hereditaments, and all and singular other the premises hereinbefore bargained and sold, or intended so to be, and every part and parcel thereof, with their and every of their rights, members, and appurtenances, unto the said Henry Howard, his executors, administrators, and assigns, from the day next before the day of the date of these presents, for and during, and unto the full end and term of one whole year thence next ensuing, and fully to be complete and ended; yielding and paying therefore the rent of one peppercorn at the expiration of the said term, if the same shall be lawfully demanded; to the intent and purpose, that, by virtue of these presents, and of the statute for transferring uses into possession, the said Henry Howard may be in the actual possession of the same premises, and may thereby be enabled to accept and take a grant and release of the freehold, reversion, and inheritance of the same premises, and of every part and

parcel thereof, to the said Henry Howard, his heirs and assigns, to the uses, and for the intents and purposes to be declared by another indenture of three parts, already prepared, and intended to be dated the day next after the day of the date hereof. In witness, &c.

last ackn^d & last ltr. his h. J. of ye Ct of Ch at Wm^{ts} ye 2^d
his h^{is} a fine s^{er} cognize de d^{en}it^r or of d^{en}ey an^yonget^r his
ye mes^{se} or ten^{em}t^{ts} to h^{is} l^{ast} w^{it}h ye aff^o but no use h^{at}te ye
decd^d of ye sd. fine so far as respects ye sd. mes^{se} or ten^{em}t^{ts} & h^{is} d^{en}
the sd. W^{ill} h^{at}te w^{it}h 137 y^r ye sd. h^{is} d^{en} to be p^{er}ch^{as}d by
as aff^o may be com^{it}d to the uses h^{ere}after exp^d. And ye sd. W^{ill} h^{at}te
ago to join in decd^d ye uses of ye sd. fine so l^{ast} as aff^o so far as
ye sd. h^{is} d^{en} in manner h^{ere}after m^{en}t^d.

The RELEASE in FEE.

To a Purchaser and his Trustee to prevent
Dower.
Also by two tenants in Comm^{on}
pat^{er}ed as such

THIS Indenture of three parts, made the
day of (to be dated the
day after the date of the bargain and sale
for a year), &c. &c. Between George Gross
of in the county of Middlesex,
Esquire, of the first part, Henry Howard of
in the aforesaid county,
Gentleman, of the second part, and John
James of the same place, Linen Draper (a
trustee nominated by and on the behalf of
the said Henry Howard), of the third part:

Whereas the said Henry Howard hath con-
tracted and agreed with the said George
Gross for the absolute purchase of the mes-
suages or tenements, lands and hereditaments
hereinafter granted and released, or intended
so to be, and the inheritance thereof, in fee-
simple, with the appurtenances, free from in-
cumbrances, at or for the price or sum^{all} of
three thousand pounds: Now this Indenture
Witnesseth, That in pursuance of the said

Part^{ts} as ab^{ov}e
J^{ohn} & G^{eorge} 2^d Ten^{ants} in
J^{ohn} G^{eorge} of Fine -
W^{ill} T^{rustee} -
The dower free -
=

Rec^{ord} y^t Iⁿ h^{is} m^{ade}
w^{it}h d^{en}it^r p^{er}op^{ty} h^{is}
J^{ohn} & G^{eorge} as Ten^{ants}
- Death &c

The contract.

for carry ye sd. reit^{ts}

concerns the undivided moiety of ye sd. fine as well as
as of her own undivided moiety of ye sd. h^{is} d^{en} to be p^{er}ch^{as}d by
Cap^t of ye sd. cognize h^{at}te ago to p^{er}ch^{as}d by such action of use in w^{it}h^{is} h^{ere}after m^{en}t^d.

more p^{er} of ye
p^{er}op^{ty} was com^{it}d
by one of the ten^{ants}
in com^{on} to ye
the rec^{ord} of w^{it}h
in this way

150

out^t and agreement, and in consideration of the sum
of three thousand pounds of lawful money
of Great Britain to the said George Gross
in hand well and truly paid by the said
Henry Howard, at or before the sealing and
delivery of these presents, the payment and
receipt of which said sum of three thousand
pounds (being in full for the absolute purchase
of the messuages or tenements, and heredita-
ments hereinafter granted and released, or in-
tended so to be) he the said George Gross
doth hereby acknowledge; and from the same,
and of and from every part thereof, doth ac-
quit, release, and discharge the said Henry
Howard, his heirs, executors, administrators,
and assigns, and every of them for ever by
these presents, he the said George Gross hath
granted, bargained, sold, aliened, released,
and confirmed, and by these presents Doth
grant, bargain, sell, alien, release, and con-
firm unto the said Henry Howard (in his ac-
tual possession now being by virtue of a bar-
gain and sale to him thereof made by the said
George Gross, in consideration of five shil-
lings, in and by one indenture, bearing date
the day next before the day of the date of these
presents, for the term of one whole year, com-
mencing from the day next before the day of
the date of the same indenture of bargain and
sale, and by force of the statute made for
transferring uses into possession) and to his
heirs, all those the messuages, lands, &c. &c.

Parcels.

with 20 messrs. were heretofore ye estate & heirs of J^d ye uncle of ye sd.
One to whom ye same descended upon ye date of ye 12th J^d intestate in
ab^t ye 4th 18.

together with all ^{h^o}louthouses, edifices, buildings, barns, dove-houses, stables, yards, gardens, orchards, ^{paths passages} lights, easements, ways, waters, water-courses, ^{h^o} commons, commodities, privileges, emoluments, advantages, hereditaments, and appurtenances whatsoever to the said messuages or tenements, lands and hereditaments, belonging or in any wise appertaining; or accepted, reputed, ^{deemeth} taken, or known as part, parcel, or member thereof; and the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits of all and singular the premises; and also all the estate, right, title, interest, use, trust, ^{inheritance} property, possession, benefit, claim, and demand whatsoever, both at law and in equity, of him the said George Gross of, in, to, or out of the said messuages or tenements, lands, hereditaments, and premises hereby granted and released, or intended so to be, and every of them, and every part and parcel thereof; together with true and attested copies of all deeds, evidences, and writings comprised or mentioned in the schedule hereunder written; the first of such copies, to be made, written, and delivered by and at the costs and charges of the said George Gross; but the second and all future copies thereof to be made, written, or taken at the reasonable request, costs, and charges of the said Henry Howard, his heirs or assigns: To Have and to Hold the said messuages or tenements, lands, here-

Common words.

of trees woodlands
of ye gr^d soil the of com
common of pasture & timber
privileges profits comm
advant^s emoluments re
members app^s what

Copies of title deeds.

If I say with all deeds
evidences & writings what
rich in any manner
ye title to ye same p^r
or any pt thereof sh^d be
in ye custody or pow^r
then ye s^d R^h & G^r
is s^d or with ye s^d
of s^d can obtⁿ with a
act^s or suit -

*Lease and Release.**all & sing.*

To the use of
the purchaser's
appointees.

ditaments, and other the premises hereby granted and released, or intended so to be, with the appurtenances, unto the said Henry Howard and his heirs for ever^a: Nevertheless, To the use of such person or persons, for such estate or estates, interest or interests, and to and for such intents and purposes, and under and subject to such powers, provisoes, declarations, and agreements, and in such manner and form as he the said Henry Howard by any deed or deeds, instrument or instruments in writing, to be sealed and delivered by him in presence of, and attested by, two or more credible witnesses, shall, from time to time, or at any time or times, direct, limit, or appoint; and in default of, and until such direction, limitation, or appointment, and as to such part or parts of the premises of which no complete direction or appointment shall be made, or to which any such direction or appointment shall not extend, to the use of the said Henry Howard and his assigns during his life, without impeachment of waste, and from and after the determination of that estate by any means in his lifetime, to the use of the said John James and his heirs, during the life of the said Henry Howard, in trust nevertheless for the said Henry Howard and his assigns; and from and after the determination of the estate so limited in use to the said

^a See Note I.

John James, and his heirs, during the life of the said Henry Howard, to the only use and behoof of the said Henry Howard, his heirs and assigns for ever; and to, for, and upon no other use, trust, intent, or purpose whatsoever.^b And the said George Gross, for himself, his heirs, executors, and administrators, doth hereby covenant, promise, and agree to and with the said Henry Howard, his appointees, heirs, and assigns, in manner following; (that is to say,) That (for and notwithstanding any act, deed, matter, or thing whatsoever, made, done, executed, committed, occasioned, or suffered by him the said George Gross, or any of his ancestors, to the contrary) he the said George Gross is, at the time of the sealing and delivery of these presents, lawfully, rightfully, and absolutely seised of, or well and sufficiently entitled to, the messuages or tenements, lands, hereditaments, and premises hereby granted and released, or intended so to be, with the appurtenances, of and in a good, sure, perfect, lawful, absolute, and indefeasible estate of inheritance in fee-simple, without any manner of condition, contingent proviso, power of revo-

And the said George Gross, for himself, his heirs, executors, and administrators, doth hereby covenant, promise, and agree to and with the said Henry Howard, his appointees, heirs, and assigns, in manner following; (that is to say,) That (for and notwithstanding any act, deed, matter, or thing whatsoever, made, done, executed, committed, occasioned, or suffered by him the said George Gross, or any of his ancestors, to the contrary) he the said George Gross is, at the time of the sealing and delivery of these presents, lawfully, rightfully, and absolutely seised of, or well and sufficiently entitled to, the messuages or tenements, lands, hereditaments, and premises hereby granted and released, or intended so to be, with the appurtenances, of and in a good, sure, perfect, lawful, absolute, and indefeasible estate of inheritance in fee-simple, without any manner of condition, contingent proviso, power of revo-

Covenants for the title. by 2 Hen. 8. c. 13. And the said George Gross, for himself, his heirs, executors, and administrators, doth hereby covenant, promise, and agree to and with the said Henry Howard, his appointees, heirs, and assigns, in manner following; (that is to say,) That (for and notwithstanding any act, deed, matter, or thing whatsoever, made, done, executed, committed, occasioned, or suffered by him the said George Gross, or any of his ancestors, to the contrary) he the said George Gross is, at the time of the sealing and delivery of these presents, lawfully, rightfully, and absolutely seised of, or well and sufficiently entitled to, the messuages or tenements, lands, hereditaments, and premises hereby granted and released, or intended so to be, with the appurtenances, of and in a good, sure, perfect, lawful, absolute, and indefeasible estate of inheritance in fee-simple, without any manner of condition, contingent proviso, power of revo-

^b See Note K. There is no objection to the power of appointment in this case, by reason of the seisin in fee-simple having been granted to Henry Howard; for the use (subject to the power) is, it is conceived,

executed in the purchaser by the statute; upon the ground, as sir Francis Bacon expresses it (Bac. Uses, 64.), that "the law will not admit fractions of estates." See 1 vol. 91. et seq.

cation, or limitation of any new or other
 use or uses, or any other matter, restraint,
 cause, or thing whatsoever, to alter, change,
 charge, revoke, make void, lessen, or deter-
 mine the same estate: And that (for and
 notwithstanding any such act, matter, or
 thing as aforesaid) ^{by} he the said George Gross
 hath ^{in himself} good right, full power, and
 lawful and absolute authority ^{to} grant, bar-
 gain, sell, alien, release, convey, and assure
 the messuages or tenements, lands, heredita-
 ments, and premises hereby granted and re-
 leased, or intended so to be, and every part
 thereof, with the appurtenances, ^{unto} the said
Henry Howard and his heirs, in manner afore-
said, and according to the true intent and
meaning of these presents: And also that it
shall be lawful for the said Henry Howard, his
appointees, heirs, and assigns, from time to
time, and at all times hereafter, peaceably
and quietly to have hold, use, occupy, pos-
sess, and enjoy the said messuages or tene-
ments, lands, hereditaments, and premises
hereby granted and released, or intended so
to be, and every part thereof, with the appur-
tenances, and to receive and take the rents,
issues, and profits thereof, and of every part
thereof, from Midsummer-day now last past,
without any let, suit, trouble, denial, eviction,
rejection, interruption, or disturbance of, from,
or by the said George Gross or his heirs, or
any other person or persons lawfully or equi-

the first & the fine
 levied as aforesaid to come
 to the said messuages

to ye uses in maner
 & accordy to

y^e ye same messuages
 y^e app^r shall & lly
 accordingly from time
 to time at all t^e times for t^e
 to & enjoy d^y & ye r^e
 profits thereof neede
 ben by ye & his
 his t^e will be any
 let suit trouble deni
 in or evic^t midson
 shute or interrup
 ator of fr^e or by ye &
 or o^r or o^r fr^e
 any p^r or o^r lly
 in or to claim by
 thro' under or in
 ten or ye & d^y I d^y
 or o^r fr^e lly
 & clear & acquit
 out & d^y or o^r
 ten ye & d^y I d^y
 only to t^e respect
 lly sav^d d^y h^e harm^l & indemⁿ of fr^e & ag^t all & all
 in or of p^r or o^r sets & t^e ch^e & t^e wh^e had made
 count^r & o^r willingly suff^r by ten ye & d^y I d^y lly he or ye & d^y I d^y
 or any o^r fr^e or any p^r or lly claim^y or to cla^y by fr^e thro'
 der or in t^e for en or any o^r fr^e.

tably claiming or to claim by, from, through, under, or in trust for him or them, or any of them, or by, from, through, or under any of his ancestors; and that free and clear, and freely and clearly acquitted, exonerated, and discharged, or otherwise by him the said George Gross, his heirs, executors, and administrators, well and sufficiently saved, defended, kept harmless, and indemnified, of, from, and against all and all manner of former and other gifts, grants, bargains, sales, leases, mortgages, jointures, dowers, and all right, and title of dower, uses, trusts, wills, intails, statutes merchant and of the staple, recognizances, judgments, extents, executions, annuities, legacies, payments, rents, and arrears of rent, forfeitures, re-entries, cause and causes of forfeiture and re-entry, and of, from, and against all and singular other estates, titles, troubles, charges, and incumbrances whatsoever, had, made, done, committed, executed, occasioned, or suffered by him the said George Gross, or any of his ancestors, or by any other person or persons lawfully or equitably claiming or to claim by, from, through, under, or in trust for him, them, or any of them^c; And moreover, that he the said George Gross and his heirs, and every ^{other} person having, or lawfully or equitably claiming, or who shall or may have,

By y^e sd. R. h. & G. & their heirs & all & co.

^c See note L.

or lawfully or equitably claim any estate, right, title, trust, or interest ¹⁶in, to, or out of the messuages or tenements, lands, hereditaments, and premises hereby granted and released, or intended so to be, ¹⁶or any part thereof, by, from, through, under, or in trust for ¹⁶him or them, ¹⁶or by, from, through, or under any of his ancestors, shall and will from time to time, and at all times hereafter, upon every reasonable request, and at the proper costs and charges ¹⁶in the law of the said Henry Howard, his appointees, heirs, or assigns, make, do, acknowledge, levy, suffer, and execute, or cause or procure to be made, done, acknowledged, levied, suffered, and executed, ¹⁶all such further and other lawful and reasonable acts, deeds, and things, ¹⁶devices, conveyances, and assurances in the law whatsoever, for the further, better, more perfectly and absolutely ¹⁶granting, releasing, conveying, assuring, and confirming the messuages or tenements, lands, hereditaments, and premises hereby granted and released, or intended so to be, and every ¹⁶part thereof, with the appurtenances, ¹⁶unto the said Henry Howard, his appointees, heirs, and assigns, or otherwise, as he or they shall direct or appoint; be the same by fine, feoffment, common recovery, deed inrolled or not inrolled, or any other matter of record, or not of record, or otherwise howsoever, as by ¹⁶the said Henry Howard, his appointees, heirs, or assigns, or

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his or their, or any of their counsel in the law, shall be reasonably advised, or devised, and required; so that ^{do not} no such further assurance or assurances contain, or imply, any further or other warranty, or covenant, than against the person or persons, who shall make and execute the same, and his, her, or their heirs, executors, and administrators' acts and deeds only; and so that the person or persons, who shall be required to make and execute any such further assurance or assurances, be not compelled, nor compellable, for the making or doing thereof, to go or travel from his, her, or their dwelling or respective dwellings, or usual place or places of abode or residence. *as he reqd. to respect*

And whereas the several title-deeds and writings relating to the said hereditaments and premises do concern the title not only of the hereditaments hereby granted and released, or intended so to be, but also of divers other estates and hereditaments of, or belonging to, the said George Gross, situate and being in the said county of Middlesex, and in other counties in England; and therefore it hath been agreed, that the same several deeds and writings shall remain in the custody and possession of the said George Gross, his heirs and assigns, upon his entering into such covenant for the production thereof as hereinafter is contained: **And therefore this Indenture further Witnesseth**, That in pursuance of the said last-mentioned agreement, *by as last afd. he no suppose of making or such fur*

the place or of his other abode or respect

Covenant to produce title-deeds.

and for the consideration hereinbefore expressed, he the said George Gross, for himself, his heirs, executors, and administrators, doth hereby further covenant, promise, and agree, to and with the said Henry Howard, his appointees, heirs, and assigns, that he the said George Gross, his heirs, executors, administrators, or assigns, shall and will, from time to time, and at all or any time or times hereafter (unless prevented by fire or any other inevitable accident), upon every reasonable request, and at the proper costs and charges of the said Henry Howard, his appointees, heirs, or assigns, produce and show forth, or course to be produced and shown forth, to the said Henry Howard, his appointees, heirs, or assigns, or to such person or persons as he or they shall direct, desire, or require, or at any trial, hearing, or examination in any court of law or equity, or other judicature, or upon the execution of any commission in England, as occasion shall be or require, the several deeds, evidences, and writings relating to, or concerning the title of the messuages or tenements, lands, hereditaments, and premises hereby granted and released, or expressed and intended so to be, mentioned in the schedule thereof hereunder written or hereunto annexed, and every or any of them, and permit and suffer copies of, or extracts from, all or any of the same deeds or writings to be made, written, and taken,

for the manifestation, defence, and support of the estate, right, title, interest, property, or possession of the said Henry Howard, his appointees, heirs, and assigns, of, in, or to all or any part of the messuages or tenements, lands, hereditaments, and premises hereby granted and released, or expressed and intended so to be, with the appurtenances. In witness, &c.

Marriage Settlement by Lease and Release.

The Release.

Parties.

THIS Indenture, &c. Between Adam Ash of, &c. of the first part, Benjamin Brown of, &c. and Celia Brown spinster, one of the daughters of the said Benjamin Brown, of the second part, Cornelius Crosby of, &c. and Charles Crompton of, &c. of the third part, David Dun of, &c. and Daniel Drew of, &c. of the fourth part, and Edgar Edwards of, &c. and Edmund Eames of, &c. of the fifth part.

The intended marriage.

Whereas a marriage is intended to be shortly had and solemnized between the said Adam Ash and Celia Brown; and the said Benjamin Brown hath agreed to pay the sum of £ unto the said Adam Ash, as and for the marriage portion of the said Celia Brown his daughter:

The considerations.

Now this Indenture Witnesseth, That in consideration of the said intended mar-

riage, and of the sum of £ , of lawful money of Great Britain, to the said Adam Ash in hand paid by the said Benjamin Brown, at or before the sealing or delivery of these presents ; the receipt and payment whereof he the said Adam Ash doth hereby acknowledge, and of and from the same, and every part thereof, doth release and acquit the said Benjamin Brown, his heirs, executors, administrators, and assigns, and every of them, for ever, by these presents ; and for making such provision and settlement for and upon the said Celia Brown, and the issue of the said intended marriage, as hereinafter mentioned ; and for settling and assuring the hereditaments hereinafter granted and released, or intended so to be, with the appurtenances, to the uses, upon the trusts, for the intents and purposes, and under and subject to the powers, provisoes, declarations, limitations, and agreements hereinafter limited, expressed, and declared of and concerning the same ; and for and in consideration of the sum of five shillings of like money to the said Adam Ash in hand paid by the said Cornelius Crosby and Charles Crompton, at or before the sealing and delivery of these presents (the receipt whereof is hereby acknowledged), he the said Adam Ash Hath granted, bargained, sold, released, and confirmed, and by these presents Doth grant, bargain, sell, release, and confirm unto the said Cornelius

Crosby and Charles Crompton (in their actual possession now being by virtue of a bargain and sale to them thereof made by the said Adam Ash, in consideration of five shillings, by indenture bearing date the day next before the day of the date hereof, for the term of one whole year, commencing from the day next before the day of the date of the same indenture of bargain and sale, and by force of the statute made for transferring uses into possession), and to their heirs, all, &c. ; and all houses, outhouses, &c., and the reversion and reversions, remainder and remainders, and yearly and other rents, issues, and profits of all and singular the premises ; and all the estate, right, title, interest, trust, property, claim, and demand whatsoever of him the said Adam Ash, of, in, to, or out of the said messuages, lands, tenements, hereditaments, and premises, and every of them, and every part and parcel of them, and every of them :

Habendum.

To Have and to Hold the messuages or tenements, lands, hereditaments, and other the premises hereby granted and released, or intended so to be, with their and every of their rights, members, and appurtenances, unto the said Cornelius Crosby and Charles Crompton, and their heirs for ever ; nevertheless to the uses, upon the trusts, for the

intents and purposes, and under and subject to the powers, provisoes, limitations, declarations, and agreements hereinafter limited, expressed, and declared of and concerning the same; that is to say,

To the use of the said Adam Ash, his heirs, and assigns, until the said intended marriage shall be had and solemnized; and from and immediately after the solemnization thereof, To the use of the intended husband in fee, until marriage; and afterwards

To the use of the said David Dun and Daniel Drew, their executors, administrators, and assigns, for and during, and unto the full end and term of ninety-nine years thence next ensuing, and fully to be complete and ended; upon the trusts, and subject to the provisoes and agreements hereinafter expressed and declared of and concerning the same; and from and after the end, expiration, or other sooner determination of the said term of ninety-nine years, and in the mean time subject thereto, and to the trust thereof, To the use of trustees for ninety-nine years; Remainder

To the use of the said Adam Ash and his assigns, for and during the term of his natural life, without impeachment of or for any manner of waste; and from and after the determination of that estate by forfeiture or otherwise, To the use of the intended husband for life; Remainder

To the use of
trustees to pre-
serve contin-
gent remain-
ders ;
Remainder

To the use of the said Cornelius Crosby and Charles Crompton and their heirs, during the life of the said Adam Ash, In Trust to support the contingent uses and estates hereinafter limited from being defeated or destroyed, and for that purpose to make entries or bring actions, as the case may require ; yet, nevertheless to permit and suffer the said Adam Ash and his assigns to receive and take the rents, issues, and profits thereof, and of every part thereof, to and from his and their own use and benefit, and from and immediately after the decease of the said Adam Ash,

To the use and
intent, that
the intended
wife may re-
ceive a rent-
charge for her
jointure and in
bar of dower ;
with

To the use, intent, and purpose, that the said Celia Brown (in case she shall survive the said Adam Ash), and her assigns, shall and may, from and after the decease of the said Adam Ash, yearly have, receive, take, and enjoy, for and during the term of her natural life, one annual sum or yearly rent-charge of £ of lawful money of Great Britain, to be yearly issuing, going, and payable out of, and charged and chargeable upon, all and singular the messuages, lands, tenements, hereditaments, and premises hereinbefore granted and released, or intended so to be ; such yearly rent-charge or sum of £ to be in full for the jointure of the said Celia Brown, and in lieu, bar, and satisfaction of and for her whole dower or

thirds at common law, or by or on account of custom, free-bench or widow's part, which she can or may, or otherwise might have, or claim, of, in, or out of all and every, or any of the freehold, copyhold, or customary manors, messuages, lands, tenements, and hereditaments whereof or whereunto the said Adam Ash now is, or at any time or times during the said intended coverture, shall be seised or entitled, for any estate of freehold or copyhold of inheritance, or to which dower or free-bench is incident; and to be paid to the said Celia Brown or her assigns, at or in the common dining-hall of Lincoln's Inn, in the county of Middlesex, on the four most usual feasts, or days of payment of rent in the year, (that is to say) on the twenty-fifth day of March, the twenty-fourth day of June, the twenty-ninth day of September, and the twenty-fifth day of December, in every year, by equal and even portions; free from taxes, and without any other deduction whatsoever; the first quarterly payment to begin and be made on such of the said days as shall first happen after the decease of the said Adam Ash.

And to and for this further use, intent, and purpose, that in case the said annual sum or yearly rent-charge of £ , or any part thereof, shall at any time or times be in arrear or unpaid, by the space of fourteen

Power of distraining,

days next over or after any of the said days, whereon the same ought to be paid as aforesaid, then and so often, it shall and may be lawful to and for the said Celia Brown and her assigns, during her natural life, into and upon the said messuages, lands, tenements, hereditaments, and premises so charged with the said annual sum, or yearly rent-charge, of £ as aforesaid, and into and upon every or any part or parcel thereof, to enter and distrain; and the distress and distresses then and there found to take, lead, drive, carry away, and impound, and in pound to detain and keep, until the said annual sum or yearly rent-charge, and all arrears thereof, togetherwith all costs, charges, and expenses, occasioned and incurred by taking and keeping such distress and distresses, shall be fully paid and satisfied; and in default of payment thereof, or of any part thereof respectively, in due time after such distress or distresses shall be taken, to appraise, sell, and dispose of, or caused to be appraised, sold, and disposed of, such distress or distresses, or otherwise to act therein according to the due course of law, and in like manner as in cases of distress taken for non-payment of rent reserved upon common leases; to the intent, that she the said Celia Brown, and her assigns, shall and may be fully paid and satisfied the said annual sum or yearly rent-charge of £ and all arrears thereof, and all costs,

charges, and expenses attending the non-payment and recovery of the same.

And to and for this future use, intent, and ^{and power of entry.} purpose, that in case the said annual sum or yearly rent-charge of £ or any part thereof, shall at any time or times be in arrear or unpaid by the space of twenty-eight days next after any of the said days hereinbefore mentioned and appointed for payment thereof, then and so often as the same shall happen (although no formal or legal demand thereof shall be made), it shall and may be lawful to and for the said Celia Brown and her assigns, into and upon all and singular the said hereditaments and premises, or into and upon any part thereof, in the name of the whole, to enter, and the same to have, hold, occupy, possess, and enjoy, and the rents, issues, and profits thereof, and of every part thereof, to have, receive, and take to and for her and their own use and benefit, until she and they shall thereby and therewith, or by any other ways, be fully paid and satisfied the said annual sum, or rent-charge of £ and all arrears thereof, and all such arrears of the same, as shall grow due or incur during the time that she or they shall by virtue of such entry or entries be in possession of the premises, or any part thereof; together with all costs, charges, and expenses whatsoever attending, or occasioned by, the non-payment

or recovery of the same, or any part thereof, or in relation thereto ; such possession, when taken, to be without impeachment of waste.

Remainder
(subject to the
rent-charge) to
the use of trus-
tees for five
hundred years.

And as, to, for, and concerning all and singular the messuages, lands, tenements, hereditaments, and premises hereby granted and released, or intended so to be, with the appurtenances, from and after the decease of the said Adam Ash, subject to, and charged with, the said yearly rent-charge or sum of £ and to the remedies hereby provided for the recovery thereof, To the use of the said Edgar Edwards and Edmund Eames, their executors, administrators, and assigns, for and during, and unto the full end and term of five hundred years thence next ensuing, and fully to be complete and ended, without impeachment of or for any manner of waste ; upon the several trusts, to and for the several intents and purposes, and under and subject to the several provisoes and agreements herein-after expressed and declared of and concerning the same term ; and from and after the end, expiration, or other sooner determination of the said term of five hundred years, and in the mean time subject thereto, and to the trusts thereof, and charged and chargeable as aforesaid.

To the use of
the first son in
tail male ; Re-
mainder

To the use of the first son of the body of
the said Adam Ash on the body of the said

Celia Brown, his intended wife, to be begotten, and of the heirs male of the body of such first son lawfully issuing; and for default of such issue,

To the use of the second, third, fourth, fifth, and all and every other the son and sons of the body of the said Adam Ash on the body of the said Celia Brown to be begotten, severally, successively, and in remainder, one after another, as they and every of them shall be in seniority of age and priority of birth, and of the several and respective heirs male of the body and bodies of all and every such son and sons lawfully issuing; the elder of such sons, and the heirs male of his body issuing, being always to be preferred and to take before the younger of such sons, and the heirs male of his and their body and respective bodies issuing; and for default of such issue,

To the use of the second and other sons in tail male; Remainder

To the use of all and every the daughter and daughters of the said Adam Ash on the body of the said Celia Brown, his intended wife, to be begotten, equally to be divided between or amongst them, share and share alike, as tenants in common, and not as joint tenants, and of the several and respective heirs of the body and bodies of all and every such daughter and daughters lawfully issuing; and in case there shall be a failure of

To the use of the daughters as tenants in common, in tail general;

With cross remainders between them; with remainder

issue of any one or more of such daughters, then as well as to the original share or shares of, as the share or shares surviving or accruing to, such last-mentioned daughter or daughters, or her or their issue, to the use of all and every other the daughter and daughters of the said Adam Ash on the body of the said Celia Brown to be begotten, equally to be divided between or among them, if more than one, share and share alike, as tenants in common, and not as joint tenants, and of the several and respective heirs of their bodies issuing ; and in case all such daughters but one shall happen to die without issue, or if there shall be but one such daughter, then to the use of such one daughter, and of the heirs of her body lawfully issuing ; and for default of such issue,

To the use of
the intended
husband in fee.

To the use of the said Adam Ash, his heirs
and assigns for ever.

Trusts declared
of the term of
ninety-nine
years ;

And as, to, for, and concerning the said term of ninety-nine years hereinbefore limited in use to the said David Dun and Daniel Drew, their executors, administrators, and assigns as aforesaid, it is hereby agreed and declared, that the same is so limited to them upon the trusts, for the intents and purposes, and under and subject to the agreements and provisoes hereinafter expressed and declared of and concerning the same ; (that is to say,)

Upon trust, that they the said David Dun and Daniel Drew, and the survivor of them, and the executors, administrators, and assigns, of such survivor, shall and do, during the joint lives of the said Adam Ash and Celia Brown, his intended wife, by, with, and out of the annual rents, issues, and profits of the hereditaments and premises comprised in the said term of ninety-nine years, or by mortgage, sale, or other disposition of the said hereditaments and premises, or any of them, or any part thereof, for all or any part of the said term of ninety-nine years therein, or by bringing actions against any of the tenants or occupiers of the premises for the rent then in arrear, or by all or any of the said ways or means, or by any other ways or means, levy and raise the annual sum of £ of lawful money of Great Britain, free and clear of and from all taxes and deductions whatsoever; and do and shall pay, apply, and dispose of the same by quarterly payments, on the days of payment hereinbefore mentioned, by even and equal portions, unto such person or persons, and for such intents and purposes only, as the said Celia Brown, by any writing or writings under her hand, from time to time, notwithstanding her coverture (but not by way of anticipation), shall direct or appoint; and in default of such direction or appointment, shall and do pay the said annual

In trust for securing pin money for the wife;

sum of £ or so much thereof, whereof she shall make no such direction or appointment as aforesaid, into the proper hands of the said Celia Brown, for her sole and separate use and benefit, and not to be subject to the debts, contracts, engagements, or control of the said Adam Ash, her intended husband, and the receipt or receipts in writing of the said Celia Brown, or of such person or persons as she shall from time to time direct or appoint to receive all or any part of the said annual sum of £ shall from time to time notwithstanding the said intended coverture, be good and effectual receipts and discharges for such sums of money, as in such receipts and discharges shall be respectively expressed to be received ; the first quarterly payment of the said annual sum of £ to be made on such of the said days of payment, as shall first happen after the solemnization of the said intended marriage :

And subject
hereto in trust
for the intended
husband.

And upon further trust, that they the said David Dun and Daniel Drew, their executors, administrators, and assigns, shall and do permit and suffer the said Adam Ash and his assigns, to receive and take the residue and overplus of the said rents, issues, and profits of the premises, after full payment and satisfaction of the said annual sum of £ and all costs and expenses attending the execution of the aforesaid trusts, or in relation

thereto, to and for his and their own use and benefit.

Provided always, and it is hereby declared to be the true intent and meaning of the said parties hereto, that if at the time of the decease of either of them the said Adam Ash and Celia Brown, or at any time during their joint lives, there shall, through the wilful neglect or default of her the said Celia Brown or her trustees, be more in arrear of the said annual sum of £ than two years' payment thereof, then, and in every such case, no further or other sum shall be raised to answer such arrears, than what shall amount in the whole to two years' payment of the said annual sum; and the residue of the said arrears shall sink into the inheritance of the same premises; and the said trustees, to whom the same premises are so limited, their executors, administrators, and assigns, shall thenceforth be freed, exempted, and discharged from the levying, raising, and payment of such residue of the said arrears.

Provision, that no more than two years' arrear of pin-money shall be recoverable.

Provided also nevertheless, that immediately after the decease of either of them the said Adam Ash and Celia Brown first dying, and after payment of all arrears (if any) of the said annual sum of £ (or of so much of such arrears as according to the proviso and declaration next hereinbefore expressed ought

Cesser of this term.

to be paid, in case of there being more in arrear than two years' payment thereof), and when the said David Dun and Daniel Drew, and each of them, and their respective executors, administrators, and assigns, shall be fully reimbursed and satisfied all costs, charges, and expenses (if any) occasioned by, or relating to, the trusts of the said term of ninety-nine years (which they are hereby respectively empowered to raise by all or any of the ways or means aforesaid, and to retain accordingly); then and immediately thenceforth, the said term of ninety-nine years of and in the said messuages, lands, tenements, hereditaments, and premises therein comprised, or so much thereof as shall remain undisposed of for the purposes aforesaid, shall cease, determine, and be utterly void to all intents and purposes whatsoever.

Trusts declared
of the term of
500 years.

And as to, for, and concerning the said term of five hundred years hereinbefore limited in use to the said Edgar Edwards and Edmund Eames, their executors, administrators, and assigns as aforesaid, it is hereby agreed and declared, that the same is so limited to them upon the trusts, for the intents and purposes, and under and subject to the provisoes, declarations, and agreements hereinafter mentioned, expressed, and declared of and concerning the same; (that is to say,)

Upon Trust, in case the said yearly rent-charge or sum of £ or any part thereof, shall be behind and unpaid by the space of forty days next over, or after, any or either of the said days of payment, whereon the same is appointed to be paid as aforesaid (although no formal or legal demand thereof shall be made); then, and so often, that they the said Edgar Edwards and Edmund Eames, or the survivor of them, his executors or administrators, shall and do from time to time, by and out of the annual rents, issues, and profits of the messuages, lands, tenements, hereditaments, and premises comprised in the same term of five hundred years, or by demising, leasing, selling, or mortgaging the same premises or any of them, or any part thereof, for all, or any part of, the same term, or by bringing actions against the tenants or occupiers of the same premises, or any of them, for the rents then in arrear, or by such other ways and means, as to them or him shall seem meet, raise and levy such sum and sums of money, as shall be sufficient from time to time to pay and satisfy the said yearly rent-charge, or sum of £ or so much thereof, as shall from time to time happen to be in arrear and unpaid; together with all loss, costs, charges, damages, and expenses which the said Celia Brown, or her assigns, or the said Edgar Edwards and Edmund Eames, or the survivor of them, his executors or administrators, or any

In trust, in the first place, for securing the rent-charge limited to the wife.

of them, shall sustain, expend, or be put unto, for or by reason of the non-payment of the same yearly rent-charge, or sum of £ or any part thereof, at the days and times, and in manner hereinbefore appointed for the payment thereof; and shall and do pay, apply, and dispose of the same monies accordingly:

And in trust in the next place, to raise portions for younger children;

And upon further Trust, in case there shall be one or more child or children of the said Adam Ash on the body of the said Celia Brown, his intended wife, to be begotten (other than, or not being an eldest or only son for the time being entitled, under the limitations hereinbefore contained, to the said messuages, lands, tenements, and hereditaments, either in possession or in remainder expectant upon the decease of the said A. Ash), that they the said Edgar Edwards and Edmund Eames, or the survivor of them, his executors or administrators, shall and do, after the decease of the said Adam Ash, or in the lifetime of the said Adam Ash with his consent, to be signified by some writing under his hand and seal (but subject and without prejudice to the raising and paying the said yearly rent-charge or sum of £ limited to the said Celia Brown for her life, and to such remedies for recovering the same as aforesaid), by mortgage, sale, demise, or other disposition of the messuages, lands, te-

nements, hereditaments, and premises comprised in the said term of five hundred years, or of a competent part thereof, for all or any part of the said term, or by and out of the rents, issues, and profits thereof, or by bringing actions against the tenants or occupiers of the same premises, or any of them, for the rents then in arrear, or by all or any of the said ways and means, or by such other ways and means as they the said Edgar Edwards and Edmund Eames, or the survivor of them, his executors or administrators, shall think fit, raise and levy, or borrow and take up at interest, for the portion or portions for such child or children (other than, or not being an eldest or only son for the time being entitled as aforesaid), the sum or sums of money hereinafter mentioned ; (that is to say) if there shall be but one such child (other than, or not being an eldest or only son entitled as aforesaid), the sum of four thousand pounds of lawful money of Great Britain, as or for his or her portion ; and to be paid and payable to, and to become vested in, such child (be the same a younger son or a daughter) at or upon such age, day, or time as the said Adam Ash by any deed or writing, to be sealed and delivered by him in the presence of and attested by, two or more credible witnesses, or by his last will and testament in writing, to be by him signed and published in the presence of, and attested by, three or more credible witnesses, shall direct

if but one,
£1000 ;

to be paid according to direction of the husband ;

and in default of appointment, to a son at 21 or daughter at 21, or marriage ;

or appoint ; and in default of such direction or appointment, to be paid to such child, being a younger son, at his age of twenty-one years, or being a daughter, at her age of twenty-one years, or day of marriage (which shall first happen), if the same age or time shall happen after the decease of the said Adam Ash ; but if the same shall happen in the lifetime of the said Adam Ash, then the portion of such child shall be considered as a vested interest in him or her at or upon the same age or time ; and in that case the payment thereof shall be postponed until after the decease of him the said Adam Ash, unless he shall signify his consent in writing under his hand and seal, that the same shall be raised and paid in his lifetime ; and if there shall be two such children and no more (other than, or not being an eldest or only son entitled as aforesaid), then the sum of six thousand pounds of like lawful money for their portions ; and if there shall be three or more such children (other than, or not being an eldest or only son for the time being entitled as aforesaid), then the sum of eight thousand pounds of like lawful money for their portions : The said sum and sums of money intended for the portions of such children (being more than one), to be shared and divided between or among them in such parts or proportions, and to vest in, and be paid to, such children respectively at or upon

if but two younger children, £6000 ;

and if three or more, £8000 ;

to be shared according to the husband's appointment ;

such ages, days, or times, and to be subject to such charges, provisoes, and limitations (such charges and limitations being for the benefit of some or one of them), and in such manner, as the said Adam Ash, by any deed or deeds, writing or writings, to be by him sealed and delivered in the presence of, and attested by, two or more credible witnesses, or by his last will and testament in writing, to be signed and published by him in the presence of, and attested by, three or more credible witnesses, shall direct or appoint; and in default of such direction or appointment, to be equally divided between or among such children, share and share alike; the share or shares of such of the said children, as shall be a younger son or sons, to be paid to him or them, at his or their age or respective ages of twenty one years; and the share or shares of such of them, as shall be a daughter or daughters, to be paid to her or them, at her or their age or respective ages of twenty-one years, or day or respective days of marriage (which shall first happen), in case the same shall happen after the decease of the said Adam Ash; but in case any of such children, being a younger son or sons, shall attain his or their age or respective ages of twenty-one years, or being a daughter or daughters, shall attain her or their age or respective ages of twenty-one years, or be married as aforesaid, in the lifetime of the

and in default
of appointment,
to be equally
divided.

said Adam Ash, then the share or shares of such younger son or sons so attaining the age of twenty-one years, and of such daughter or daughters so attaining that age, or marrying in the lifetime of the said Adam Ash, shall be a vested interest or vested interests in him, her, or them respectively; but the payment of such share or shares shall be postponed till after the decease of the said Adam Ash, unless he shall signify such consent as aforesaid, that the same or any of them shall be raised and paid in his lifetime.

Declaration and provision in case of a partial appointment.

Provided always, and it is hereby agreed and declared between and by the said parties hereto, that in case any appointment shall be made in pursuance of the powers aforesaid, or either of them, which shall only extend to a parts or parts of the sum or sums of money, hereby intended for the portion or portions of such child or children as aforesaid, such appointment shall be valid and effectual notwithstanding the non-appointment of the remaining part or parts of such portion or portions; but in that case any daughter or younger son entitled to a share under such appointment shall be entitled to no further share of and in the remaining or unappointed part or parts of the monies, hereby intended for portions as aforesaid, unless and until he or she shall have brought his or her appointed share into hotchpot, and shall have accounted for

the same accordingly, unless the person making such appointment shall declare a contrary intention in writing.

And upon further Trust, that they the said Edgar Edwards and Edmund Eames, and the survivor of them, his executors or administrators, shall and do, after the decease of the said Adam Ash (subject and without prejudice as aforesaid), by and out of the annual rents, issues, and profits of the messuages, lands, tenements, hereditaments and premises comprised in the said term of five hundred years, levy and raise for the maintenance and education of all or any of such children, for whom a portion or portions is or are hereby intended to be provided as aforesaid, such yearly sum and sums of money as hereinafter mentioned; (that is to say,) until such child or children shall respectively attain the age of twelve years, such yearly sum for each of them as will be equivalent to the interest of the portion hereby intended for him or her as aforesaid, after the rate of two pounds for every one hundred pounds by the year; and from and after the age of twelve years, and until such portion or respective portions shall become payable, such yearly sum for each such child, as will be equivalent to the interest of the portion hereby intended for him or her as aforesaid, after the rate of four pounds for every one hundred pounds by

Provision for
maintenance.

depart this life under that age, without being, or having been married; then and in such case, and in default of and subject to any such appointment as aforesaid, the portion hereby intended to be provided for each such daughter so dying, and for each such son so dying, or becoming an eldest or only son, or so much and such part thereof as shall not be sooner advanced for any younger son or sons as hereinafter mentioned, shall accrue and belong to the survivor or survivors, and other or others of such children (other than, or not being an eldest or only son entitled as aforesaid), and shall vest in, and be paid to him, her, or them (if more than one), in equal parts and shares, at or upon such and the same ages, days, and times respectively, and in such and the same manner as is hereinbefore declared, touching or concerning his, her, or their original portion or portions, or as near thereto as circumstances will permit; and that in case any other or others of such children shall die, or become an eldest or only son entitled as aforesaid, before such accruing or surviving part or share, parts or shares, shall become vested as aforesaid, then all and every such accruing or surviving part or share, parts or shares, shall again be subject and liable to such new chance, contingency, and condition of accruer to the survivor or survivors, and other or others of such children, as before is declared touching his, her, and their original portion

and portions: But so nevertheless, that no one child shall by survivorship or otherwise have, or be entitled to, more than the sum of four thousand pounds for his or her portion; nor any two children more than the sum of six thousand pounds between them for their portions.

Power for the trustees to raise a part of the portions for the advancement of younger sons.

Provided always, and it is hereby agreed and declared between and by the said parties hereto, that it shall and may be lawful to and for the said Edgar Edwards and Edmund Eames, and the survivor of them, his executors or administrators, at any time or times in the lifetime of the said Adam Ash, with his consent, signified by some deed or deeds, writing or writings, to be sealed and delivered by him in the presence of, and to be attested by, two or more credible witnesses, and at any time or times after his decease, by and of the proper authority of the said Edgar Edwards and Edmund Eames, or the survivor of them, his executors or administrators, as they or he shall see occasion, to levy and raise by all or any of the ways and means as aforesaid (but subject nevertheless and without prejudice as aforesaid), any sum or sums of money, in part of the portion or portions hereby intended for such of the said children, as shall be a younger son or sons; and shall and do, with the consent in writing of the said Adam Ash during his life, and

after his decease, then at their or his discretion, pay and apply the monies, so to be raised, for the purpose of placing and putting such younger son or sons, for whom, or in part of whose then apparent portion or portions such sum or sums of money shall be so raised, in or to any trade, business, profession, or employment, or otherwise, for his or their benefit, or advancement in the world, notwithstanding his or their portion or portions shall not then have become payable as aforesaid; so nevertheless, that such sum and sums of money, so to be raised as last mentioned, shall not exceed one half part of the apparent portion or portions of such younger son or sons respectively; and so nevertheless, that such sum and sums of money shall go, be considered, and taken as part of the portion or portions hereby provided for such child or children, for whose benefit such sum or sums shall be raised as aforesaid.

And upon this further Trust, that they the said Edgar Edwards and Edmund Eames, and the survivor of them, his executors and administrators, do and shall permit and suffer the person or persons, to whom the next and immediate reversion or remainder expectant upon the determination of the said term of five hundred years of and in the premises therein comprised, shall for the time being belong, to receive the residue or

In trust, to permit and suffer the persons in remainder to receive the overplus of the rents.

surplus of the rents and profits, which shall remain after, and not be applied in or towards the execution and performance of the trusts hereby declared of the said term of five hundred years.

No sale until a portion shall become payable

Provided always, That no demise, sale, or mortgage, shall be made for raising such portion or portions as aforesaid, until some one of the said portions shall become payable under or by virtue of the trusts aforesaid, unless with the consent of the said Adam Ash, testified as aforesaid, or unless the same shall be made for the purpose of raising any sum or sums of money for the advancement of a younger son or sons, pursuant to the power or authority hereinbefore in that behalf contained.

Money advanced by the father in his lifetime to be considered as part of the portions.

Provided also, and it is hereby agreed and declared between and by the said parties hereto, that in case the said Adam Ash shall, in his lifetime, give or advance any sum or sums of money for or towards the preferment or advancement of any of the said children, being a younger son or sons, in the way of, or for the placing him or them in any profession, business, or employment, or being a daughter or daughters, in marriage; then and in such case, if any such sum or sums of money so to be advanced, shall be equal to, or exceed the portion or portions hereinbe-

fore intended to be provided for such child or children respectively, such advanced sum or sums shall be accounted in full for the portion or portions so as aforesaid hereinbefore provided for such child or children respectively; but if such advanced sum or sums shall be less than the portion or portions hereinbefore provided or intended for such child or children respectively, then such advanced sum or sums shall be accounted as part of the portion or portions so as aforesaid hereinbefore provided or intended for such child or children respectively; and in case any child or children shall be so advanced as aforesaid by the said Adam Ash, he the said Adam Ash shall (unless he shall declare a contrary intention in writing) stand in the place of the child or children so advanced as aforesaid in respect of the sum or sums of money so by him given by way of advancement as aforesaid, and to the extent of such advancement shall be considered as a purchaser of the share or shares of such child or children.

Provided also, and it is hereby further agreed and declared, That when the trusts hereinbefore declared of and concerning the same term shall have been executed and performed, or satisfied, or shall have become unnecessary, or incapable of taking effect, and the costs and charges (if any) of the trustees

Cesser of the term.

of the same term, their executors and administrators, in and about the execution and performance of the same trusts, shall have been fully paid and satisfied (and which they are hereby respectively authorized and empowered to levy and raise by all or any of the ways and means aforesaid, and to retain accordingly); then and immediately thenceforth the said term of five hundred years of and in the premises therein comprised, or so much thereof as shall remain unsold and undisposed of for the purposes aforesaid, shall cease, determine, and be utterly void to all intents and purposes whatsoever.

Power enabling
the husband to
make leases.

Provided always, and it is hereby agreed and declared, that it shall and may be lawful to and for the said Adam Ash, from time to time during his life, and after his decease, then to and for the guardian or guardians for the time being of any child or children of the said Adam Ash, on the body of the said Celia Brown to be begotten, who by virtue of, or under the limitations hereinbefore contained, shall be entitled to the possession or receipt of the rents and profits of the hereditaments and premises hereby granted and released, or intended so to be, from time to time, during the minority or respective minorities of such child or children to demise or lease all or any part or parts of the hereditaments and premises hereby granted

and released, or intended so to be, with the appurtenances, to any person or persons, for any term or number of years, not exceeding twenty-one years in possession, and not in reversion, or by way of future interest ; so that there be reserved and made payable on every such lease, during the continuance thereof, the best and most improved yearly rent or rents, to go along with, and be incident to, the immediate reversion or remainder of the premises so to be leased, that can or may be reasonably had or gotten for the same ; without taking any fine, premium, or foregift, for the making thereof ; and so that in every such lease there be contained a condition of re-entry on the non-payment of the rent or rents to be thereon or thereby respectively reserved, by the space of twenty-one days next after the same shall become due and payable ; and so that the lessee or the respective lessees, to whom such lease or leases shall be made, seal and deliver a counterpart or counterparts or such lease or leases ; and so that none of the lessees, to whom any such lease or leases shall be made, be, by any clause or words therein contained, authorized to commit waste, or exempted from punishment for committing waste ; any thing herein contained to the contrary thereof notwithstanding.

Power of sale
and exchange.

Provided always, and it is hereby agreed and declared between and by the said parties to these presents, that it shall and may be lawful to and for the said Cornelius Crosby and Charles Crompton, and the survivor of them, and the heirs of such survivor, and they and he are hereby authorized and empowered, at any time or times hereafter, at the request, and by the direction of the said Adam Ash and Celia Brown during their joint lives, and in case the said Celia Brown shall depart this life in the lifetime of the said Adam Ash, then at the request and by the direction of him the said Adam Ash during his life (such request and direction to be testified by some writing or writings under the hands and seals of the said Adam Ash and Celia Brown, or under the hand and seal of the said Adam Ash, in case he shall be the survivor of them, to make sale, alien, and dispose of, or to convey in exchange for, or in lieu of, other messuages, lands, or hereditaments, to be situate somewhere in that part of Great Britain called England, or in Wales, all or any part of the hereditaments hereby granted and released, or intended so to be, with the appurtenances, and the inheritance thereof in fee-simple, to any person or persons whomsoever, either together or in parcels, and for such price or prices in money, or for such equivalent or recompense in messuages, lands, or hereditaments, as to them

the said Cornelius Crosby and Charles Crompton, or the survivor of them, or his heirs, shall seem reasonable; and for the intents and purposes aforesaid, or any of them, it shall and may be lawful to and for the said Cornelius Crosby and Charles Crompton, and the survivor of them, and the heirs of such survivor, at such request, and by such direction, and so testified as aforesaid, by any deed or deeds, writing or writings, to be by them the said Cornelius Crosby and Charles Crompton, or the survivor of them, or his heirs, sealed and delivered in the presence of, and attested by, two or more credible witnesses, to revoke, determine, and make void all and every the uses, estates, trusts, limitations, powers, provisoes, and agreements hereinbefore limited, expressed, declared, and contained, of and concerning the hereditaments so to be sold or exchanged, or any part thereof; and by the same, or any other deed or deeds, writing or writings, to be by him or them sealed and delivered, and attested as aforesaid, to limit and appoint, direct and declare, such use or uses, estate or estates, trust or trusts of the hereditaments, the uses whereof shall be so revoked, which it shall be thought necessary or expedient to limit, declare, or appoint in order to effect such sale, exchange, or disposition as aforesaid; and that upon any such exchange as aforesaid, it shall and may be lawful for the said Cornelius Crosby and Charles Crompton,

or the survivor of them, or his heirs, to receive or take any sum or sums of money by way of equality of exchange; and also upon payment of any money to arise by such sale of the said hereditaments, or any part thereof, or to be received or taken for, or by way of, equality of exchange, it shall and may be lawful to and for the said Cornelius Crosby and Charles Crompton, or the survivor of them, or his heirs, to give and sign receipts for the money, for which the same shall be so sold, or so to be paid for equality of exchange; which receipts shall be sufficient discharges to the person or persons paying the same respectively for the money, for which the same shall be so given; or for so much thereof as in such receipts shall be respectively acknowledged or expressed to be received; and that the person or persons paying the same respectively, and taking such receipt or receipts for the same as aforesaid, shall not afterwards be obliged to see to the application, or be in any wise answerable or accountable for any loss, misapplication, or non-application of such money, or any part thereof: Provided nevertheless, and it is hereby also agreed and declared between and by the said parties hereto, that when all or any part or parcel, or parts or parcels, of the said hereditaments hereby made saleable as aforesaid, shall be sold in pursuance of these presents for a valuable consideration in money,

and also when any sum or sums of money shall be received for equality of exchange in pursuance of the power hereinbefore contained ; then they the said Cornelius Crosby and Charles Crompton, or the survivor of them, or his heirs, shall with all convenient speed (with the consent of the said Adam Ash and Celia Brown during their joint lives, or if the said Adam Ash shall survive the said Celia Brown, then with the consent of the said Adam Ash during his life, to be testified by writing under their or his hands or hand, and after the decease of the said Adam Ash, then with the consent in writing of the person or persons, who would, under or by virtue of the limitations hereinbefore contained, or to be contained or referred to in the settlement or conveyance hereinafter directed, or any of them, be for the time being in the actual possession, or entitled to the receipt of the rents and profits of the hereditaments to be purchased as hereinafter is mentioned or directed, in case the same were then actually purchased, if such person or persons be of full age, but if not, then with the consent in writing of the guardian or guardians for the time being of such person or persons respectively) lay out and invest^a all and every the sum and sums of money, which shall arise by such sale or sales, and be paid for equality of exchange as afore-

^a See 1 vol. 423. note b.

said, in the purchase of other messuages, lands, or hereditaments in possession, to be situate, being, or arising somewhere in that part of Great Britain called England, or in Wales, of a clear and indefeasible estate of inheritance in fee-simple (whereof any part, not exceeding one fourth part in any one purchase, may, if the parties interested shall think fit, be copyhold of inheritance); and as well the hereditaments so to be purchased, as all and every the hereditaments so to be received in exchange as aforesaid, shall thereafter forthwith be settled, conveyed, and assured to, for, and upon such uses, trusts, intents, and purposes, and with, under, and subject to such powers, provisoes, conditions, and agreements, as are in and by these presents limited, expressed, declared, and contained, of and concerning the hereditaments hereby granted and released, or intended so to be; or as near thereto as the deaths of parties, and other contingencies, or the circumstances of the case, will then permit: Provided always, and it is hereby further agreed and declared between and by the said parties to these presents, that in the mean time, and until the money to arise by such sale or sales, or to be received for equality of exchange as aforesaid, shall be laid out and invested in a purchase or purchases in the manner hereinbefore mentioned, it shall and may be lawful to and for the said Cornelius Crosby and

Charles Crompton, and the survivor of them, and the heirs of such survivor, by and with the consent and approbation of the said Adam Ash and Celia Brown, or of the survivor of them, to be testified as last mentioned, and from and after the decease of such survivor, then by and of the proper authority of the said trustees or trustee for the time being, from time to time to place out and invest such sum or sums of money in the public stocks or funds, or at interest upon government or real securities in England and Wales; and from time to time, with such consent, and so testified as aforesaid, or of their or his own proper authority, as the case shall happen, to alter, vary, sell, transfer, and dispose of such stocks, funds, or securities, and again to lay out and invest the money arising by such alteration, sale, transfer, or disposition, upon new or other stocks or funds, or at interest upon government or real securities of the like nature, as often as they shall think proper; and the interest, dividends, and annual proceeds arising from such stocks, funds, or securities, shall from time to time go and be paid to such person or persons, and be applied to such uses, intents, and purposes, and in such manner as the rents and profits of the hereditaments, to be purchased therewith, would go and be payable or applicable, in case such purchase or purchases were actually made.

Power of appointing new trustees.

Provided always, and it is hereby also agreed and declared, that in case the trustees in and by these presents nominated and appointed, or any of them, or any succeeding or other trustees or trustee of the said trust estate and premises, to be nominated as hereinafter mentioned, or their, or any of their heirs, executors, or administrators, shall happen to die, or be desirous to be discharged of and from, or refuse or become incapable to act in the trusts or powers hereinbefore expressed, declared, and contained, before the same trusts shall have been fully performed, exercised, or satisfied, then and so often as the same shall happen it shall and may be lawful for the said Adam Ash and Celia Brown, during their joint lives, and after the decease of either of them, to and for the survivor of them, during his or her life, and after the decease of such survivor, then to and for the surviving, or continuing, or other trustee or trustees of the premises, the trustee or trustees of which shall so die, desire to be discharged, or refuse, or become incapable to act as aforesaid, by any deed or writing under their, his, or her hands and seals, or hand and seal, to nominate, substitute, and appoint any other person or persons to be a trustee or trustees in the place and stead of such trustees or trustee so dying, desiring to be discharged, or refusing or becoming incapable to act as aforesaid; and that when and so often as any such new trustees

or trustee shall be nominated and appointed as aforesaid, all the said trust estate and premises, the trustee or trustees whereof shall so die, desire to be discharged, or refuse, or become incapable to act as aforesaid, shall be thereupon with all convenient speed conveyed, transferred, assigned, and assured respectively (according to the nature and tenure thereof) in such sort and manner, and so that the same shall and may be legally and effectually vested in the newly appointed trustee or trustees jointly with such of the former trustees, as shall be willing and capable to act; or in case there shall be no continuing former trustee, then in such newly appointed trustee or trustees only; To, for, and upon the uses, trust, intents, and purposes hereinbefore limited, expressed, declared, and contained of and concerning the same; and that the new trustee or trustees, who shall be appointed in the room or stead of the said Cornelius Crosby and Charles Crompton, or either of them as aforesaid, either alone or jointly with such of them the said Cornelius Crosby and Charles Crompton as shall continue to act, shall and may, either before, or after any such conveyance or assurance as aforesaid, exercise all or any of the powers or authorities hereinbefore reserved or given to the said Cornelius Crosby and Charles Crompton, and the survivor of them, and the heirs of such sur-

vivor as aforesaid^a; and that every such new trustee shall and may in all things, and in all respects, act and assist in the management, carrying on, and executing of the trusts, to which he shall be so appointed, as fully and effectually, and with the same power and powers, authority and authorities, as if such new trustee had been originally by these presents nominated and appointed, and as the said trustees of the same trust estates and premises named in these presents are, or would be enabled to do, or might or could have done, under or by virtue of the same, or any clause, power, or proviso hereinbefore contained or implied; or otherwise, as if such original trustees had been then living and continuing to act under or in execution of the trusts, powers, and authorities reposed in, or reserved to, them in and by these presents.

Clauses of indemnity to the trustees.

Provided also, and it is hereby further agreed and declared between and by the said parties hereto, that the said several trustees in and by these presents nominated and appointed, and hereafter to be nominated and appointed by virtue of the said last mentioned power, and each and every of them, their and each and every of their heirs, executors, administrators, and assigns, shall be charged and chargeable only for so much money as they

^a See 1 Vol. 439, 442.

and every of them shall respectively actually receive, by virtue of, or under, these presents, or the trusts aforesaid ; and that any one or more of them shall not be answerable for the other or others of them, nor for the acts, receipts, neglects, or defaults of the other or others of them ; but each of them for his own acts, receipts, neglects and defaults only : nor shall they, or any of them, be answerable or accountable for any person or persons, who is, are, or shall be the receiver or receivers of the rents and profits of the said hereditaments and premises, or any of them, or any part thereof, or in whose hands the same, or any of the aforesaid trust monies, shall or may be deposited or lodged for safe custody ; nor for the insufficiency or deficiency of title in any manors, lands, or hereditaments, which may be had or received by way of exchange, for or in lieu of all or any part of the messuages, lands, tenements, and hereditaments hereby made saleable and exchangeable as aforesaid, or which may be purchased with the money to arise by sale thereof, in case the same shall be sold as aforesaid ; nor for the insufficiency or deficiency of any security or securities, in or upon which the monies to arise by such sale or sales, or to be received for equality of exchange, or any part thereof, shall or may be placed out or invested as aforesaid ; nor for any misfortune, loss, or damage, which may happen in the execution of

any of the aforesaid trusts, or in relation thereto, except the same shall happen by or through their own wilful neglects or defaults respectively; and also that the said several trustees, and each and every of them, their and each and every of their heirs, executors, administrators, and assigns, shall and may, by and out of the monies, which shall come to their respective hands by virtue of these presents, or the trusts aforesaid, retain to, and reimburse themselves respectively, and also allow to their and his co-trustee and co-trustees, all loss, costs, damages, and expenses, which he or they or any of them shall or may respectively suffer, sustain, expend, disburse, be at, or be put unto, or which shall or may be to him, them, or any of them occasioned, for or on account, or by reason or means, of the trusts hereby in them reposed, or the management and execution thereof, or otherwise howsoever relating thereto.

Usual covenants for the title.

And the said Adam Ash, for himself, his heirs, executors, and administrators, doth hereby covenant, promise, and agree with and to the said Cornelius Crosby and Charles Crompton, their heirs, and assigns, in manner following; (that is to say,) That (for and notwithstanding any act, deed, matter, or thing whatsoever, made, done, committed, executed, or suffered by him the said Adam Ash, or any of his ancestors, to the contrary)

he the said Adam Ash, now at the time of the sealing and delivery of these presents, is lawfully, rightfully, and absolutely seised of, or otherwise well and sufficiently entitled to the said messuages or tenements, lands and hereditaments hereby granted and released, or expressed, or intended so to be, and of and to every of them, and every part and parcel thereof, with their and every of their rights, members, and appurtenances, for an estate of inheritance in fee-simple ; without any manner of condition, trust, power of revocation, or limitation of any new or other use or uses, or other restraint, cause, matter, or thing whatsoever, to alter, change, charge, defeat, revoke, make void, lessen, or determine the same estate : And also, that he the said Adam Ash (for and notwithstanding any such act, matter, or thing as aforesaid) now at the time of the sealing and delivery of these presents, hath in himself good right, full power, and lawful and absolute authority to grant, bargain, sell, release, and assure the messuages, lands, tenements, and hereditaments hereby granted and released, or expressed, or intended so to be, and every of them, and every part and parcel thereof, with their and every of their rights, members, and appurtenances, unto the said Cornelius Crosby and Charles Crompton, their heirs and assigns, to, for, and upon the uses, trusts, intents, and purposes, and in manner and form

aforesaid, according to the true intent and meaning of these presents; And likewise, that the messuages, lands, tenements, and hereditaments hereby granted and released, or expressed, or intended so to be, and every of them, and every part and parcel thereof, with their and every of their rights, members, and appurtenances, shall and lawfully may from time to time, and at all times hereafter, remain, continue, and be, to, for, and upon the several uses, trusts, intents, and purposes hereinbefore limited, expressed, and declared of and concerning the same, and shall and may be peaceably and quietly had, held, and enjoyed, and the rents and profits thereof received and taken accordingly, without the let, suit, trouble, denial, eviction, ejection, disturbance, molestation, hindrance, interruption, claim, or demand whatsoever of, from, or by the said Adam Ash, or his heirs, or any person or persons claiming, or to claim, by, from, through, under, or in trust for him, them, or any of them, or any of his ancestors; and that free and clear, and freely, clearly, and absolutely acquitted, exonerated, and discharged, or otherwise by him the said Adam Ash, his heirs, executors, or administrators, or some or one of them, well and sufficiently saved, defended, kept harmless and indemnified of, from, and against all former and other gifts, grants, bargains, sales, leases, mortgages, jointures, dowers,

right and title of dower, uses, trusts, wills, intails, statutes, recognizances, judgments, extents, executions, rents, arrears of rent, annuities, debts, legacies, sum and sums of money, estates, titles, troubles, charges, and incumbrances whatsoever, made, done, or committed by the said Adam Ash, or any of his ancestors, or any person or persons claiming, or to claim, by, from, or under him, or them, or any of them; And moreover, that he the said Adam Ash, and his heirs, and every other person having, or lawfully or equitably claiming, or who shall or may at any time or times hereafter have, or lawfully or equitably claim any estate, right, title, or interest whatsoever, in, to, or out of the messuages, lands, tenements, and hereditaments hereby granted and released or expressed, or intended so to be, or in, to, or out of any of them, or any part or parcel thereof, by, from, under, or in trust for him or them, or any of them, or any of his ancestors, shall and will, from time to time, and at all times hereafter, upon every reasonable request of the said Cornelius Crosby and Charles Crompton, their heirs or assigns, but at the proper costs and charges in the law of the person or persons for the time being, beneficially entitled to the premises, make, do, acknowledge, levy, suffer, and execute, or cause and procure to be made, done, acknowledged, levied, suffered, and executed, all such further and other

lawful and reasonable acts and things, deeds, devices, conveyances, and assurances in the law, whatsoever, for the further, better, more perfectly and absolutely granting, releasing, and assuring the messuages, lands, tenements, and hereditaments hereby granted and released, or expressed, or intended so to be, and every of them, and every part and parcel thereof, with their and every of their rights, members, and appurtenances, to, for, and upon the several uses, trusts, intents, and purposes, and under and subject to the several powers, provisoes, declarations, and agreements hereinbefore limited, expressed, declared, and contained of and concerning the same, or such of them as shall be then subsisting, undetermined, or capable of taking effect; as by them the said Cornelius Crosby and Charles Crompton, their heirs or assigns, or any of them, their or any of their counsel in the law, shall be reasonably devised, or advised, and required; so that such further assurance or assurances contain or imply in them, no further or other covenant or warranty than against the person or persons who shall be required to make and execute the same, his, her, or their heirs, executors, and administrators' acts and deeds only; and so that the party or parties who shall be required to make and execute any such further assurance or assurances, be not compelled nor compellable for the making or doing thereof

to go and travel from his, her, or their dwelling, or respective dwellings, or usual place or places of abode. In witness, &c.

The following are Extracts from a Deed prepared by the late Mr. Booth, and alluded to in the Opinion stated in Appendix VII. 1st Vol.

This Indenture, &c. 1772.

BETWEEN the right honourable P. earl of H. and the most honourable Jemima marchioness G. his wife, of the first part, the right honourable the lady Annabella G. the eldest daughter of the body of the said J. marchioness G. begotten by the said earl of H. of the second part, the right honourable lady M. J. G. the second and youngest daughter of the body of the said J. marchioness G. begotten by the said earl of H. of the third part, J. V. of, &c. of the fourth part, J. E. of &c. of the fifth part, J. J. and D. W. of the sixth part, the right honourable W. E. and E. H. of the seventh part, and the right honourable J. lord B. of the eighth part; the deed recites

An Indenture dated the 26th of June 1736; whereby the reversion in fee, to take effect after failure of issue male of the duke of K., of and in certain manors, &c., in the said counties of _____ were conveyed by H. duke of K., to the use of the said marchioness G. and her assigns for her life; with remainder to trustees to preserve contingent remainders; with remainder to the first and other sons of the said lady G. successively in tail general; with remainder to her first and other daughters successively in tail general; with divers remainders over. And also recites the articles on the marriage of the said J. marchioness G. only child of J. lord G. and lady A. his wife with the said P. earl of H. dated the 19th May 1740; whereby (amongst other things) the duke of K. covenants that he will, by his will or otherwise, give his personal estate, and the monies to arise by sale of certain real estates, to be laid out in lands to be settled to the use of the said duke for his life, with remainder to trustees to preserve contingent remainders, with remainder to his first and other sons in tail male, with remainder to the said marchioness G. for her life, with remainder to trustees to preserve contingent remainders; with remainder to trustees for the term of five hundred years in trust to raise 800*l.* per annum for the said lord H. for his life and for younger childrens' portions; with like re-

mainders over, as in the said indenture of the 26th June 1736: it also recites

The death of the duke of K. on the 22nd day of, &c. without issue male; and

The will of the said duke of K. whereby he devises his Herefordshire estates to be sold; and the money arising by the sale thereof, and the residue of his personal estate, after payment of his debts, &c. to be laid out in the purchase of lands, to be settled to the same uses as are mentioned in the same indenture of the 26th June 1736: and the deed also recites

Several codicils to the said will, and

An Act of Parliament of the 15 and 16 Geo. II. for carrying the said articles into execution; and also,

Indentures of lease and release of 11th, and 12th of, &c. whereby several estates in the county of B., purchased with the money arising by sale of the duke's Herefordshire estates, were settled to the uses mentioned in the said duke's will.

“ And whereas there is not any issue male
“ of the body of the said J. marchioness G.,
“ and therefore they the said P. earl of H.

“ J. marchioness G., and the said lady Anna-
“ bella G., the eldest daughter of the said J.
“ marchioness G., who has attained her age
“ of twenty-one years, as hereinbefore is men-
“ tioned, are desirous of suffering common re-
“ coveries, as well of the said several manors,
“ messuages, lands, and hereditaments, com-
“ prised in the said recited indenture of the
“ 26th of June 1736, and in the will of the
“ said D. of K., as of the several heredita-
“ ments and premises so purchased with the
“ said trust monies as aforesaid, and com-
“ prised in the said last recited indentures of
“ lease and release, and of barring the estate
“ tail so vested in the said lady Annabella G.,
“ and all the remainders over, and the rever-
“ sion and remainder in fee, which was so
“ limited to the right heirs of the said H. late
“ D. of K. ; but without prejudicing or dis-
“ turbing any of the precedent uses, estates,
“ or charges, in and by the said indenture of
“ the 26th of June 1736, and the said will
“ and codicils, or the said recited Act of
“ Parliament, or the said recited indenture of
“ the 12th day of, &c. now last past, or any
“ of them, expressly or by reference limited,
“ created, or declared, prior to, or before, the
“ said remainder or limitation to the first
“ daughter of the body of the said J. Mar-
“ chioness G. by the said earl of H. (party
“ hereto) begotten, or prior to, or before, the
“ said remainder or limitation to the said

“ lady Annabella G., and the heirs of her
“ body lawfully issuing, and without pre-
“ judicing, or disturbing, any of the powers
“ or privileges to the said precedent uses or
“ estates annexed or belonging; all which pre-
“ cedent uses, estates, powers, and privileges,
“ are intended to be corroborated and con-
“ firmed by the common recoveries so in-
“ tended to be suffered.

“ And whereas it hath been agreed by and
“ between the said P. earl of H., J. mar-
“ chioness G., and lady Annabella G. that in
“ case the said lady A. G. shall happen to
“ marry during the joint lives of the said P.
“ earl of H. party hereto, and J. marchioness
“ G., and that the said P. earl of H. shall
“ and do previously to and upon such mar-
“ riage of the said lady A. G. settle and se-
“ cure to the good liking of the said lady A.
“ G., and of such husband as she shall marry,
“ an annuity or yearly rent-charge of 1500*l.*,
“ to be paid and payable to the said lady A.
“ G. and her assigns during the joint natural
“ lives of the said J. marchioness G. and lady
“ A. G., as and for, or towards, a provision for
“ the immediate support and maintenance of
“ the said lady A. G., during the lifetime of
“ the said marchioness G. her mother; then
“ and in such case, and in consideration
“ thereof, the hereditaments and premises
“ hereby realeased shall, from and after the

“decease of the said J. marchioness G., stand
“and be charged and chargeable with so
“much of the sum of 10,000*l.* or 20,000*l.*, as
“the case shall happen, by the said recited
“Act of Parliament charged on, and to be
“raised and paid out of, the real estates in
“the same Act mentioned, and late of the
“said P. earl of H. deceased, for the portion
“or portions of the younger child or chil-
“dren, of the said P. earl of H. party hereto,
“on the body of the said J. marchioness G.
“begotten or to be begotten, as he the said
“P. earl of H. party hereto, by any deed or
“deeds, writing or writings, with or without
“power of revocation, to be by him sealed
“and delivered in the presence of, and attest-
“ed by, two or more credible witnesses, or by
“his last will and testament in writing, or
“any codicil or codicils, to be by him signed
“in the presence of and attested by three or
“more credible witnesses, shall declare, di-
“rect, or appoint, as an equivalent or satis-
“faction for so much of the said sum of
“10,000*l.* or 20,000*l.* (*as the case shall hap-*
“*pen*), as shall be raised and paid out of
“the said real estates late of the said P. earl
“of H., deceased, for the portion or portions
“of such younger child or children. And it
“hath been also further agreed, that the
“hereditaments herein by these presents
“granted and released shall be charged with
“such yearly sum or sums of money, not

“exceeding in the whole the sum of 300*l*.
“as hereinafter mentioned.

“Now this indenture witnesseth, that in
“order to bar, dock, and destroy the said es-
“tate tail in remainder now vested in the
“said lady Annabella G., and all other estates
“tail and remainders subsequent thereto, in
“and by the said indenture of the 26th of
“June 1736, and the said will and codicils
“of the said H. late duke of K., and the said
“hereinbefore recited Acts of Parliament, and
“the said recited articles of agreement ex-
“ecuted previous to the marriage of the said
“earl of H., party hereto, with the said J.
“marchioness G. ; and the said indenture of
“release of the 12th day of, &c. now last
“past, or any of them, or otherwise, expressly,
“or by reference, or equitably, limited, cre-
“ated, and declared, and all remainders or
“reversions thereupon expectant or depend-
“ing, of and in the several manors and scites
“of manors, &c., hereinafter by these pre-
“sents granted, bargained, sold, released,
“and confirmed, or intended so to be (but
“without prejudicing or disturbing the said
“uses, estates, and charges, prior or prece-
“dent to the said remainder in tail, now vested
“in the said lady Annabella G. as aforesaid,
“or any of the powers or privileges to the
“precedent uses or estates or any of them
“annexed or belonging); And to the intent

“that the same manors, &c. with the appur-
“tenances (but subject and without prejudice
“to the uses, estates, and charges, prior and
“precedent to the said remainder in tail, now
“vested in the said lady A. G. and the powers
“thereto annexed or belonging), may be as-
“sured and limited to such uses, upon such
“trusts, for such intents and purposes, and
“by, with, and under such limitations,
“powers, provisoes, and charges as are here-
“inafter mentioned and declared of and
“concerning the same,” and also in con-
sideration of 10s., &c. and for divers other
good causes and valuable considerations,
the said earl of H., party to these presents,
J. marchioness G., and lady A. G., hereunto
moving; “They the said P. earl of H.
“J. marchioness G., and lady Annabella G.
“have, and each of them hath, granted, bar-
“gained, sold, aliened, released, and con-
“firmed, and by these presents do, and each
“of them doth grant, bargain, sell, alien,
“release, and confirm unto the said J. N.”
(in his actual possession, &c.) and to his heirs
all, &c.

To have and to hold the said heredita-
ments, and premises, &c. unto and to the use
of the said J. N. and his heirs during the
joint lives of the said J. marchioness G. and
J. N.

“ And it is hereby declared and agreed to
“ be the true intent and meaning of these pre-
“ sents, and of all the said parties hereunto,
“ that the said J. N., and his assigns, shall
“ stand and be seised of the said several ma-
“ nors and scites of manors, capital and other
“ messuages, farms, rectories, advowsons,
“ tythes, lands, tenements, rents, heredita-
“ ments, and premises hereby released, or
“ intended so to be, with their and every of
“ their rights, members, and appurtenances,
“ for and during the joint natural lives of the
“ said J. marchioness G. and J. N. aforesaid,
“ to and for the end, intent, and purpose that
“ he the said J. N. by virtue of these presents
“ may be and become perfect tenant of the
“ immediate freehold of the said manors, &c.
“ in order that eight or more good and perfect
“ common recoveries, one or more for each of
“ the said counties of B, &c. may be per-
“ fected, suffered, and executed thereof, in
“ manner hereinafter mentioned ; for which
“ purpose it is hereby covenanted, concluded,
“ declared, and agreed, by and between the
“ said parties to these presents, that it shall
“ and may be lawful to and for the said J. E.
“ at the costs and charges of the said earl of
“ H., before the end of T. term next ensuing
“ the date of these presents, to sue forth out
“ of his Majesty’s High Court of Chancery,
“ and prosecute against the said J. N., one or
“ more writ or writs of entry, sur disseisin

“en le post returnable and to be returned
“before the justices of His Majesty’s Court
“of Common Pleas at Westminster, thereby
“demanding, by apt and convenient names,
“quantities, and qualities of land, number
“of messuages, and acres, and other proper
“descriptions, the said manors, &c. hereby
“granted and released, or intended so to be,
“with their, and every of their, rights, mem-
“bers, and appurtenances; to which said
“writ or writs, the said J. N. shall appear
“gratis in his proper person, and vouch to
“warranty the said lady Annabella G. who
“shall appear in her proper person, or by
“attorney lawfully authorized in that behalf,
“and enter into the said warranty, and she
“shall vouch over to warrant the same pre-
“mises the common vouchee of the said Court
“of Common Pleas, who shall thereupon
“appear and imparl, and after imparlance had
“shall make default, and depart in contempt
“of the said Court; and such further and
“other proceedings shall be had on the said
“writ or writs, as that eight or more com-
“mon recoveries, one or more for each of
“the said counties of B. &c. shall be there-
“upon had and suffered of the said manors
“and premises hereby granted and released,
“or intended so to be, with their, and every
“of their rights, members, and appur-
“tenances, according to the form and effect
“of common recoveries for assurance of

“lands in such cases had and accustomed;
“and it is hereby concluded, declared, and
“agreed upon, by and between all and every
“the said parties to these presents, that from
“and immediately after such time or times,
“as the said common recoveries, or any of
“them, shall be had, executed, perfected,
“and suffered as aforesaid, the said common
“recoveries in manner aforesaid, or in any
“other manner, or at any other time, or
“times, to be had, perfected, executed, and
“suffered, of the said manors and heredita-
“ments, and each and every of the said
“common recoveries, as to the hereditaments
“to be comprised therein respectively, and
“the full force and execution thereof, and of
“these presents, and the grant and release
“herein contained, and all and every other
“common recovery and recoveries, and other
“assurances in the law whatsoever of the
“said manors, &c. hereby granted and re-
“leased, or any of them, or any part or parts
“thereof, had, suffered, and executed, or to
“be had, suffered, and executed, by, or be-
“tween the said parties hereto, or any of
“them, or whereunto they, or any of them,
“are, is, or shall be, party or parties, privy
“or privies, as to all the said hereditaments
“and premises hereinbefore by these presents
“granted and released, or intended so to be,
“and as to every part and parcel thereof,
“with their, and every of their, rights,

“ members, and appurtenances shall be and
“ enure, and the recoveror or recoverors in
“ such common recoveries named or to be
“ named, and his or their heirs shall stand
“ and be seised of the said manors, &c.
“ hereby granted and released, or intended
“ so to be, with their and every of their
“ rights, members, and appurtenances :

“ In the first place for corroborating,
“ strengthening, and confirming, the said
“ several uses, estates, terms of years, and
“ charges, in and by the said hereinbefore
“ recited indentures, will, codicils, articles
“ of agreement, and acts of Parliament, or
“ any of them, expressly or by reference,
“ limited, created, and declared, precedent
“ to, or before, the limitation to the first
“ daughter of the body of the said J. mar-
“ chioness G. begotten, and the heirs of her
“ body issuing, or precedent, or prior to, the
“ said limitation to the said lady Annabella
“ G. and the heirs of her body lawfully issu-
“ ing, or to be begotten, and for corroborat-
“ ing, strengthening, and confirming, the
“ several powers and privileges to the same
“ precedent uses, estates, terms of years, and
“ charges, and every, or any of them, be-
“ longing or annexed : And from and imme-
“ diately after the determination of the said
“ several precedent uses, estates, and charges,

“ and as the same shall severally end and de-
“ termine, and subject to the said precedent
“ uses, estates, and charges, and every of
“ them, and without prejudice to them, or
“ any of them, to such uses, upon such trusts,
“ for such intents and purposes, and subject
“ to such provisoes, charges, conditions, and
“ agreements, as are hereinafter expressed
“ and declared of and concerning the same ;
“ (that is to say,) To the use of such person
“ and persons, in such order and manner;
“ and to, for, and upon, such estate and es-
“ tates, uses, trusts, intents, and purposes,
“ and with, upon, under, and subject to,
“ such powers, provisoes, conditions, and re-
“ strictions, and with such remainders or limi-
“ tations over, and charged and chargeable
“ with such yearly and gross sum and sums
“ of money, and in such manner, as the said
“ P. earl of H. party hereto, J. marchioness
“ G., and lady Annabella G. at any time or
“ times hereafter, during their joint natural
“ lives, by any deed or deeds, writing or
“ writings, with or without power of revoca-
“ tion, to be by them, and each and every
“ of them, sealed and delivered in the pre-
“ sence of, and attested by, two or more
“ credible witnesses, shall jointly direct, limit,
“ and appoint : And in default of such joint
“ direction, limitation, and appointment, and
“ in the mean time, and until such joint di-
“ rection, limitation, and appointment shall

“ be so made and executed, and until the
“ estate or estates, interest or interests,
“ charge or charges, thereby to be directed,
“ limited, and appointed, shall commence
“ and take effect, and also subject to any
“ such direction, limitation, or appointment,
“ as shall be so made, where the same shall
“ not happen to be a complete and entire ap-
“ pointment, direction, and limitation, of
“ and concerning the whole of the said ma-
“ nors, &c. and of and concerning the whole
“ estate and interest therein, and as to such
“ and so many of the said hereditaments and
“ premises hereinbefore by these presents
“ granted and released, as shall remain un-
“ appointed, or concerning which no com-
“ plete direction, limitation, or appointment,
“ shall be made, and as and when the uses,
“ estates, and charges therein, or thereupon,
“ or in or upon any part or parts thereof, to
“ be directed, limited, or appointed, shall
“ end and determine,” To the use of the said
E. E. and E. L. for 700 years, to commence
from the death of the marchioness G., with
remainder to lady A. G. for life; with re-
mainder to trustees to preserve, &c.; with re-
mainder to her first and other sons succes-
sively in tail; with remainder to her first and
other daughters successively in tail: with
divers remainders over; and the ultimate re-
mainder to the right heirs of the said D. of
K. deceased.

“ Provided always and it is hereby agreed
“ and declared between and by the said par-
“ ties to these presents, that if the said J. N.
“ shall not pay to the said P. earl of H. and J.
“ marchioness G. or the survivor of them,
“ the sum of £100,000 of lawful money of
“ Great Britain, on or before the 1st day of
“ August next ensuing the day of the date of
“ these presents, then, and in such case, the
“ said grant, and release, so hereby made,
“ shall, as to all and every of the said here-
“ ditaments before by these presents granted
“ and released, or intended so to be, with
“ theirand everyof their appurtenances, cease,
“ determine, and be absolutely null and void;
“ and it shall be lawful for the said P. earl of
“ H. and J. marchioness G. in case she shall
“ survive the said earl of H. to enter on, and
“ hold and enjoy, all and every the said
“ premises hereinbefore by these presents
“ granted and released, with their appurte-
“ nances, as in their or her former estate, any
“ thing hereinbefore contained to the con-
“ trary thereof in any wise notwithstanding^a.”

^a See Note 1. Div. IV. to page 203. 6. Butl. Co. Litt.

PARTITION.

THIS Indenture, &c. between R. B. of &c. and G. his wife, whose maiden name was G. F. of the first part; L. L. of &c. widow, whose maiden name was L. F. of the second part; M. F. of &c. of the third part; and J. F. of &c. of the fourth part.

Whereas by the death of H. F. late of &c. deceased, the late brother of the said G. B., L. L., and M. F., they the said G. B., L. L., and M. F. as his sisters and coheirs, became seised of, or entitled to, the freehold estates in the county of Y. hereinafter mentioned.

And whereas the said R. B. and G. his wife, L. L., and M. F., being desirous of making a partition of the said estates, to which they are respectively entitled as aforesaid, they did by articles of agreement, bearing date on or about the 25th day of &c. now last past, nominate, authorize, and ap-

point J. S. of, &c. and J. B. of, &c. to survey, measure, and value the said estates, and every part thereof, and to set out, divide, and allot the same, in manner hereinafter mentioned; and the said R. B. and G. his wife, L. L., and M. F. did by the same articles agree to pay all costs, charges, and expenses, which should be occasioned by, or incurred in, making such partition, and the costs and charges of all deeds, fines, and assurances, which should be requisite, or necessary, for effecting the same partition and the confirmation thereof, in equal shares and proportions;

And whereas in pursuance, and by virtue of such authority as aforesaid, they the said J. S. and J. B., after having attentively reviewed and surveyed the said estates late of the said H. F. deceased, with the appurtenances, and the timber and wood growing thereon respectively, and after duly examining and considering the said estates and the condition thereof, and the buildings belonging thereto, and the state of the repairs thereof, and the situation, quantity, nature, quality, and condition of the same estates, and the several rent-charges, and outgoings, chargeable upon, and issuing out of, the same, did fairly and impartially make a partition of all the said estates into three equal parts, shares, and allotments; and the said J. S. and J. B., have

caused a schedule or particular to be made of each part, share, or allotment, containing a description, rental, and valuation, of the lands and hereditaments comprised in such schedule or particular: and which schedules, being marked, 1, 2, and 3, were inclosed in three several cases, or wrappers, made up in the same form, and sealed by the said J. S. and J. B.;

And whereas at a meeting between the said R. B. and G. his wife, and L. L., and M. F., held on the 9th day of October instant, before the date of these presents, at the dwelling-house of the said R. B., the said three schedules, or particulars, so numbered, inclosed, and sealed as aforesaid, were put into a basket by the said J. S. and J. B., and one of the said schedules was then and there drawn out of the said basket by the said R. B. and G. his wife, as and for their lot or share of and in the said hereditaments, which schedule on being opened by the said J. S. and J. B. proved to be No. 1; and one other of the said schedules was drawn out of the said basket by the said L. L., as and for her lot or share of and in the said hereditaments, which on being opened, as aforesaid, proved to be No. 3; and the remaining schedule was drawn out of the said basket by the said M. F. as and for her lot or share of and in the said

hereditaments, and which on being opened, as aforesaid, proved to be No. 2 ;

And whereas the said R. B. and G. his wife, L. L., and M. F., being severally convinced of the impartiality of the said J. S. and J. B. in making the said partition and allotment of the said estates in manner aforesaid, and being satisfied with the several lots, or shares, by them respectively drawn at the said meeting, have mutually agreed, and are willing and desirous, to corroborate and confirm the said allotments and partition in such manner as hereinafter is expressed.

Now therefore this indenture witnesseth, that in pursuance of the said agreement, and in consideration of the premises, and for corroborating and confirming the partition and division so made of the said estates by the said J. S. and J. B. as aforesaid ; and to the end and intent, that the said several lots and shares of and in the same, respectively drawn by the said R. B. and G. his wife, L. L., and M. F., may be held and enjoyed in severalty ; and also in consideration of the sum of 10*s.* to the said R. B. and G. his wife, L. L., and M. F. paid by the said J. F. at or before the sealing and delivery of these presents (the receipt whereof is hereby acknowledged), the said R. B. and G. his wife, L. L., and M. F. have, and every of them hath, granted, bar-

gained, sold, aliened, released, and confirmed, and by these presents do, and every of them doth, grant, bargain, sell, alien, release, and confirm unto the said J. F., (in his actual possession now being by virtue of a bargain and sale to him thereof made by the said R. B. and G. his wife, L. L., and M. F. in consideration of 5s. by indenture bearing date the day next before the day of the date of these presents for one year, commencing from the day next before the day of the date of the same indenture of bargain and sale, and by force of the statute made for transferring uses into possession), and to his heirs,

All that capital messuage, or tenement, &c. &c.; and also all and singular other messuages, cottages, lands, tenements, and hereditaments whatsoever in the parish of in the said county of G. or elsewhere in the kingdom of Great Britain, of or to which the said H. F. was at the time of his decease seised or entitled at law or in equity for any estate of inheritance in possession, reversion, remainder, or expectancy; and all and singular houses, outhouses, &c. &c.; and the reversion and remainder, reversions and remainders, yearly and other rents, issues, and profits of the premises; and all the estate, right, title, interest, property, claim, and demand whatsoever, of them the said R. B. and G. his wife, L. L., and M. F., and every of

them, in, to, and out of the same messuages and hereditaments, and every of them ;

To have and to hold the said messuages, lands, and other hereditaments expressed to be hereby granted and released, with the appurtenances, unto the said J. F., and his heirs for ever, to the several uses hereinafter limited and expressed concerning the same ; (that is to say,)

As to, for, and concerning all such and so many, and such part and parts of the said messuages and other hereditaments expressed to be hereby granted and released, as are comprised in the schedule hereinbefore mentioned, to be marked No. 1, and to be drawn by, and as for the lot or share of, the said R. B. and G. his wife, a true copy of which schedule No. 1, is hereunto annexed, or hereunder written, and every part and parcel thereof, with their and every of their rights, members, and appurtenances, to the use of the said R. B., and his assigns, during the term of his natural life ; and from and immediately after his decease, to the use of the said G. B., her heirs and assigns for ever ; and to be by him, her, and them held in severalty, in lieu of the undivided part or share of the said R. B. and G. his wife, in right of the said G., of and in the entirety of the said messuages and other

hereditaments hereinbefore expressed to be hereby granted and released ;

And as, to, for, and concerning all such and so many, and such part and parts of the said messuages and other hereditaments hereinbefore expressed to be hereby granted and released, as are comprised in the said schedule hereinbefore mentioned to be marked No. 3, and to be drawn by the said L. L., and as and for the lot or share of her the said L. L., a true copy of which said schedule No. 3, is also hereunto annexed, or hereunder written, and every part and parcel thereof, with their, and every of their, rights, members, and appurtenances, to the use of the said L. L., her heirs and assigns for ever, to be by her and them held in severalty, in lieu of the undivided part or share of the said L. L. of and in the entirety of the said messuages and other hereditaments hereinbefore expressed to be hereby granted and released ;

And as, to, for, and concerning all such and so many, and such part and parts of, the said messuages and other hereditaments hereinbefore expressed to be hereby granted and released as are comprised in the said schedule hereinbefore mentioned to be marked No. 2, and to be drawn by, and as and for the lot or share of, the said M. F., a true copy of which said last mentioned schedule No. 2,

is also hereunto annexed, or hereunder written, and every part and parcel thereof, with their and every of their rights, members, and appurtenances, to the use of the said M. F. her heirs, and assigns for ever, to be by her and them held in severalty, in lieu of her undivided part or share of and in the entirety of the said messuages and other hereditaments hereinbefore expressed to be hereby granted and released.

And for the better, and more effectually, conveying and assuring of the said messuages and other hereditaments hereinbefore expressed to be hereby granted and released, and every part thereof, to the uses hereinbefore limited and expressed concerning the same, it is hereby mutually covenanted and agreed by and between the said parties to these presents, and the said R. B. doth hereby for himself, his heirs, executors, and administrators, and so far as concerns the acts, deeds, and defaults of himself and the said G. B. his wife; and each of them the said L. L. and M. F. doth hereby for herself, her heirs, executors, and administrators, and so far as concerns her own acts, deeds, and defaults, covenant, promise, and grant to, and with, the said J. F. his heirs, and cestuisque use; that they the said R. B. and G. his wife, L. L., and M. F., shall and will, at their own costs and charges, as of Trinity term last

past, or before the end of Michaelmas Term now next ensuing, acknowledge and levy in due form of law in his Majesty's Court of Common Pleas at Westminster, before his Majesty's justices of the same Court, unto the said J. F. and his heirs, one or more fine or fines sur conuzance de droit come ceo, &c. with proclamation to be thereupon had and made according to the form of the statute in that behalf made and provided, and the usual course of fines with proclamations for assurance of lands in such cases used and accustomed, of the said messuages and other hereditaments hereinbefore expressed to be hereby granted and released with their and every of their rights, members, and appurtenances, by such apt and convenient names, quantities, and qualities of land, number of messuages and acres and other descriptions, as shall be sufficient to comprise and ascertain the same; and it is hereby agreed and declared between and by the said parties to these presents, that the said fine or fines so as aforesaid or in any other manner or at any other time or times to be acknowledged and levied, and also all other fines, common recoveries, conveyances, and assurances in the law whatsoever already had, made, done, acknowledged, levied, suffered, and executed, of the said messuages and other hereditaments, hereinbefore expressed to be hereby granted and released, or any of them, or any part

thereof, either alone or jointly with any other hereditaments by, or between the said parties to these presents, or any of them, or whereunto they, or any of them, are or is, or shall be parties or privies, or a party or privy, shall be and enure, and shall be adjudged, construed, expounded, deemed, and taken to be and enure, and that the conuzee or conuzees named, or to be named, in such fine or fines, and his or their heirs, shall stand and be seised of the said messuages and other hereditaments hereinbefore expressed to be hereby granted and released, with the rights, members, and appurtenances thereto respectively belonging, to the several uses hereinbefore limited and expressed concerning the same.

And the said R. B. doth hereby for himself, his heirs, executors, and administrators, and so far only as concerns the acts, deeds, and defaults of himself and the said G. his wife, and each of them, and the quiet enjoyment and further assurance of one undivided third part of the said messuages and other hereditaments, and each of them, the said L. L. and M. F. doth hereby for herself, her heirs, executors, and administrators, and so far only as concerns her own acts, deeds, and defaults, and the quiet enjoyment and farther assurance of another undivided third part of the same messuages and other hereditaments, co-

venant and agree with the said J. F. his heirs and cestuisque use, and separately with every of such cestuisque use, in manner following; (that is to say,) that the said messuages and other hereditaments hereinbefore expressed to be hereby granted and released, with the appurtenances, shall from time to time, and at all times hereafter, remain, continue, and be to the uses hereinbefore limited and expressed, concerning the same, and shall and may be peaceably and quietly had, held, and enjoyed, and the rents and profits thereof received and taken accordingly, without the lawful let, suit, trouble, denial, eviction, or interruption, of, from, or by the said R. B. and G. his wife, L. L., and M. F., or any of them, or from, or by any person or persons claiming or to claim, by, from, through, or under them, or any of them; and that free and clear, and freely and clearly acquitted, exonerated, and discharged, or otherwise by the said R. B. and G. his wife, L. L., and M. F., or some of them, their, or some of their, heirs, executors, or administrators, well and sufficiently saved, defended, kept harmless, and indemnified, of, from, and against all and singular former and other gifts, grants, bargains, sales, leases, mortgages, estates, titles, troubles, charges, and incumbrances whatsoever had, made, done, committed, or suffered, or to be had, made, done, committed, or suffered by the said R. B. and G. his wife, L. L.,

and M. F., or any of them ; and moreover that the said R. B. and G. his wife, L. L., and M. F. respectively, and their respective heirs, and every other person having, or lawfully, or equitably claiming, or who shall or may have, or lawfully, or equitably claim, any estate, right, title, or interest in, to, or out of, the said messuages and other hereditaments hereinbefore expressed to be hereby granted and released, or any of them, or any part thereof, by, from, through, or under them, or any of them, shall and will from time to time, and at all times hereafter, upon every reasonable request, and at the proper costs and charges of the said J. F. his heirs, or cestuisque use, or any of them, make, do, and execute, or cause or procure to be made, done, and executed, all such further and other lawful and reasonable acts, deeds, devices, conveyances, and assurances in the law whatsoever, for the further, better, and more perfectly and absolutely granting, conveying, and assuring the same messuages and other hereditaments, with the appurtenances, to the uses hereinbefore limited concerning the same ; as by the said J. F. his heirs or cestuisque use, or any of them, or their, or any of their, counsel in the law shall be reasonably advised, or devised, and required ; so that the person or persons, who shall be required to make and execute such further assurance or assurances be not compelled nor compellable, for the making or doing thereof, to go or travel from

his, her, or their dwelling or respective dwellings, or place or respective places of residence or abode.

And whereas upon the treaty for the aforesaid partition it was agreed, that the several title deeds, evidences, and writings relating to the said messuages and other hereditaments hereinbefore expressed to be hereby granted and released should be deposited with the said L. L., upon the said L. L. entering into a covenant to produce the same, and permit copies to be made thereof, when thereunto required, in manner hereinafter mentioned ; and in pursuance of such agreement, the title deeds, evidences, and writings, mentioned in the schedule hereunder written, have been delivered to the said L. L., which she doth hereby acknowledge.

Now this Indenture further witnesseth, that in pursuance of the said last mentioned agreement, and in consideration of the premises, the said L. L. for herself, her heirs, executors, administrators, and assigns, doth hereby covenant, promise, and agree to and with the said J. F. his heirs, and cestuisque use, and, as a separate covenant, to and with each of them the said R. B. and G. his wife, and F. M. his and her heirs and assigns, that she the said L. L. her heirs, executors, administra-

tors, or assigns, shall and will from time to time, and at all or any time or times hereafter (unless prevented by fire or other inevitable accident), upon every reasonable request, and at the proper costs and charges, of the said J. F. his heirs, or cestuisque use, or of any of such cestuisque use, produce and show forth, or cause or procure to be produced and shown forth, to him, her, or them, or any of them, or to such person or persons as he, she, or they, or any of them, shall direct, desire, or require, or at any trial, hearing, or examination, in any court of law or equity, or other judicature, or upon the execution of any commission in England, as occasion shall be or require, the several deeds, evidences, and writings mentioned in the schedule thereof hereunder written, and every or any of them; and make and deliver copies of, or extracts from, all, or any of, the same deeds, evidences, or writings, for the manifestation, defence, and support of the estate, right, title, interest, property, or possession of the said J. F. his heirs and cestuisque use, or any of them, of, in, or to all or any of the said messuages, and other hereditaments hereinbefore expressed to be hereby granted and released, with the appurtenances. In witness, &c.

[*The Schedule to which the above written Indenture refers.*]

APPOINTMENT

TO A PURCHASER IN FEE.

Parties.

Recital of a
lease and re-
lease.

THIS Indenture of three parts, made the
day of in the year
of the reign of our sovereign Lord George
the Third, by the grace of God, of Great
Britain, France, and Ireland, king, defender
of the faith, and in the year of our Lord
Christ one thousand seven hundred and nine-
ty-six: Between Michael Munn of
of the first part, Nathan Nore of
of the second part, and Peter Penny of
of the third part: ~~Whereas~~ by inden-
tures of lease and release, bearing date respec-
tively on or about the and
days of January now last past, the release
being made, or expressed to be made, between
Charles Church of of the first part,
thesaid Michael Munn of the second part, and
the said Nathan Nore of the third part; the
messuages or tenements, piece or parcel of
ground, the hereditaments hereinafter de-

scribed, and granted and released, or intended so to be, were conveyed and assured, and now stand limited, To the use of such person or persons, for such estate or estates, interest or interests, and to and for such intents and purposes, and in such manner and form, as he the said Michael Munn by any deed or deeds, instrument or instruments in writing, to be sealed and delivered by him in the presence of, and attested by, two or more credible witnesses, or by his last will and testament in writing, or any codicil thereto, to be signed and published by him in the presence of, and attested by, three or more credible witnesses, shall direct, limit, or appoint; and in default of, and until such direction, limitation, or appointment, To the use of the said Michael Munn and Nathan Nore, and the heir and assigns of the said Nathan Nore for ever; In Trust, nevertheless, as to the estate and interest thereby limited in use to the said Nathan Nore, his heirs and assigns, for, and for the only benefit of, the said Michael Munn, his heirs and assigns for ever; and to be conveyed and disposed of from time to time, as he the said Michael Munn, his heirs or assigns, should direct or appoint. **And whereas** the said Peter Penny hath contracted and agreed with the said Michael Munn for the absolute purchase of the messuages or tenements, piece or parcel of ground and hereditaments hereinafter described, and

To such uses as the vendor shall appoint.

The contract.

intended to be hereby appointed and released, and the inheritance thereof in fee-simple, free from all incumbrances, at or for the price or sum of three hundred pounds: **Now this Indenture Witnesseth**, that in pursuance of the said recited contract, and in consideration of the sum of three hundred pounds of lawful money of Great Britain to the said Michael Munn in hand paid by the said Peter Penny, at or before the sealing and delivery of these presents, the receipt whereof he the said Michael Munn doth hereby acknowledge, and of and from the same and every part thereof doth acquit, release, and discharge the said Peter Penny, his heirs, executors, administrators, and assigns, and every of them, for ever by these presents; he the said Michael Munn, in pursuance of the power or authority given or reserved to him in and by the said recited indenture of release, and by force and virtue thereof, and of every other power and authority to him given or reserved, in him vested, or in any wise enabling him in this behalf, Hath directed, limited and appointed, and by this deed or instrument in writing, sealed and delivered by him in the presence of, and attested by, two credible witnesses, Doth direct, limit, and appoint, that the messuages or tenements, piece or parcel of ground and hereditaments, hereinafter described, and intended to be hereby granted and released, with the appurtenances, shall

The Appointment.

henceforth remain, continue, and be, to the use of the said Peter Penny, his heirs and assigns for ever. **And this Indenture further Witnesseth**, that in further pursuance of the said recited contract, and for the consideration aforesaid; and also in consideration of the sum of five shillings of lawful money of Great Britain, to the said Michael Munn and Nathaniel Nore in hand paid by the said Peter Penny, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, He the said Nathan Nore, at the request, and by the direction of the said Michael Munn (testified by his being a party to, and sealing and delivering these presents), **Hath bargained, sold, aliened, and released, and by these presents Doth bargain, sell, alien, and release, and the said Peter Penny Hath granted, bargained, sold, aliened, released, and confirmed, and by these presents Doth grant, bargain, sell, alien, release, and confirm unto the said Peter Penny** (in his actual possession now being by virtue of a bargain and sale to him thereof made by the said Michael Munn and Nathan Nore, in consideration of five shillings, by indenture bearing date the day next before the day of the date of these presents, for the term of one whole year, commencing from the day next before the day of the date of the same indenture of bargain and sale, and by force of the statute made for transferring uses into

possession), and to his heirs and assigns, all those messuages, &c. ; all that piece or parcel of ground, &c. ; together with all houses, outhouses, buildings, barns, stables, yards, gardens, orchards, trees, woods, underwoods, hedges, ditches, mounds, fences, ways, waters, watercourses, lights, easements, privileges, commodities, advantages, emoluments, hereditaments, rights, members, and appurtenances whatsoever, to the said messuages or tenements, piece or parcel of ground, and hereditaments belonging, or in any wise appertaining, or at any time heretofore used or enjoyed therewith, or accepted, reputed, deemed, taken, or known as part, parcel, or member thereof, or of any part thereof; and the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits of all and singular the premises; and also all the estate, right, title, interest, use, trust, property, possession, claim, and demand whatsoever, both at law and in equity, of them the said Michael Munn and Nathan Nore, and of each of them, in, to, and out of the said messuages or tenements, piece or parcel of ground, and hereditaments, hereby granted and released, or intended so to be, and every or any part thereof; together with all deeds, evidences, and writings relating to, or concerning the premises hereby granted and released, or intended so to be, or any of them, or any part thereof, now in the cus-

today or power of them the said Michael Munn and Nathan Nore, or of either of them, or which they or either of them can obtain or procure without suit at law or in equity : To Habendum.

Have and To Hold the said messuages or tenements, piece or parcel of ground, and hereditaments hereby granted and released, or expressed or intended so to be, and every part thereof, with the appurtenances, unto the said Peter Penny, his heirs and assigns for ever, to the only proper use and behoof of the said Peter Penny, his heirs and assigns for ever ;

And the said Nathan Nore, The trustee covenants against his own acts.

for himself, his heirs, executors, and administrators, doth hereby covenant and declare with and to the said Peter Penny, his heirs and assigns, that he the said Nathan Nore hath not at any time heretofore made, done, executed, committed, or knowingly suffered, or been privy to any act, deed, matter, or thing whatsoever, whereby, or by reason or means whereof, the messuages or tenements, piece or parcel of ground, and hereditaments hereby appointed and released, or expressed or intended so to be, or any part thereof, are, is, can, shall, or may be conveyed, assured, impeached, charged, or in any wise incumbered : And the

said Michael Munn, for himself, his heirs, executors, and administrators, doth hereby covenant, promise, and agree to and with the said Peter Penny, his heirs and assigns, in manner following ; (that is to say,) That (for and not-

Covenants for the title.

withstanding any act, deed, matter, or thing whatsoever made, done, executed, committed, occasioned, or suffered by him the said Michael Munn, or the said Nathan Nore, to the contrary) they the said Michael Munn and Nathan Nore are, or one of them is, at the time of the sealing and delivery of these presents, lawfully, rightfully, and absolutely seised of, or well and sufficiently entitled to the messuages or tenements, piece or parcel of ground, and hereditaments hereby appointed and released, or expressed or intended so to be, with the appurtenances, for an estate of inheritance in fee-simple; without any manner of condition, contingent proviso, power of revocation, or limitation of any new, or other use or uses, or any other matter, restraint, cause, or thing whatsoever to alter, change, charge, revoke, make void, lessen, or determine the same estate; and that (for and notwithstanding any such act, deed, matter, or thing as aforesaid) they the said Michael Munn and Nathan Nore, or one of them, now, at the time of the sealing and delivery of these presents, have or hath, in themselves or himself, good right, full power, and lawful and absolute authority, to appoint and release the messuages or tenements, piece or parcel of ground, and hereditaments hereby appointed and released, or expressed or intended so to be, and every part thereof, with the appurtenances, unto, and to the use of, the said

Peter Penny, his heirs and assigns, in manner aforesaid, and according to the true intent and meaning of these presents; and also, that it shall and may be lawful for the said Peter Penny, his heirs and assigns, from time to time, and at all times hereafter, peaceably and quietly to enter into and upon, and to have, hold, use, occupy, possess, and enjoy the said messuages or tenements, piece or parcel of ground, and hereditaments hereby appointed and released, or expressed or intended so to be, and to receive and take the rents, issues, and profits thereof, and of every part thereof, to and for his and their own use and benefit, without any let, suit, trouble, denial, eviction, ejection, interruption, or disturbance of, from, or by the said Michael Munn, or his heirs, or any other person or persons lawfully or equitably claiming, or to claim, by, from, through, under, or in trust for him, them, or any of them; and that free and clear, and freely and clearly acquitted, exonerated, and discharged, or otherwise by the said Michael Munn, his heirs, executors, and administrators, well and sufficiently saved, defended, kept harmless, and indemnified, of, from, and against all and all manner of former and other gifts, grants, bargains, sales, leases, mortgages, jointures, dowers, and all right and title of dower, uses, trusts, wills, intails, statutes, recognizances, judgments, extents, executions, debts, annuities, legacies,

sum and sums of money, rent, and arrears of rent, and of, from, and against all and singular other estates, titles, troubles, charges, and incumbrances whatsoever had, made, done, executed, committed, occasioned, or suffered by the said Michael Munn, or by any other person or persons lawfully or equitably claiming or to claim, by, from, through, under, or in trust for him: And moreover, that he the said Michael Munn, and his heirs, and every other person having, or lawfully or equitably claiming, or who shall or may have, or lawfully or equitably claim, any estate, right, title, or interest, in, to, or out of the said messuages or tenements, piece or parcel of ground, and hereditaments, hereby appointed and released, or expressed or intended so to be, or any part thereof, by, from, through, under, or in trust for him or them, shall and will from time to time, and at all or any time or times hereafter, upon every reasonable request, and at the proper costs and charges in the law of the said Peter Penny, his heirs or assigns, make, do, acknowledge, levy, suffer, and execute, or cause and procure to be made, done, acknowledged, levied, suffered, and executed, all such further and other lawful and reasonable acts, deeds, and things, devices, conveyances, and assurances in the law whatsoever, for the further, better, more perfectly and absolutely granting, releasing, conveying, and assuring

the said messuages or tenements, piece or parcel of ground, and hereditaments hereby appointed and released, or expressed or intended so to be, and every part thereof, with the appurtenances, unto and to the use of the said Peter Penny, his heirs and assigns for ever; or otherwise as he or they shall direct or appoint; as by the said Peter Penny, his heirs or assigns, or any of them, or his or their or any of their counsel in the law, shall be reasonably devised or advised, and required; so that such further assurance or assurances contain or imply no further or other warranty or covenant than against the person or persons, who shall be required to make and execute the same, and his, her, or their respective heirs, executors, and administrators' acts and deeds only; and so that the person or persons, who shall be required to make and execute any such further assurance or assurances, be not compelled, nor compellable, for the making or doing thereof, to go or travel from his, her, or their dwelling or respective dwellings, or usual place or places of residence or abode. In witness, &c.

APPOINTMENT.

Settlement before Marriage under a Power of Appointment.

Parties **THIS** Indenture, &c. between Francis Frederick of, &c. of the first part, William Frederick of, &c. (the eldest son of the said Francis Frederick), of the second part, Grace Griffith of, &c. spinster, of the third part, Henry Howard of, &c., and Henry Hunt of, &c. of the fourth part, John Jones of, &c. and James Impey of, &c. of the fifth part, and Launcelot Lyon of, &c. and Luke Lucas of, &c. of the sixth part.

Indentures of
lease and re-
lease recited.

Whereas, by indentures of lease and release, bearing date respectively the days of the release being of four parts, and made or expressed to be made between the said Francis Frederick of the first part, the said William Frederick of the second part, James Allen of, &c. of the third part, and William Andrews of, &c. of

the fourth part, and by virtue of a common recovery, duly suffered in term in the

year of the reign of his present Majesty, in pursuance of an agreement in the said indenture of release contained ; all that the manor of in the county of

with the rights, members, and appurtenances, and all that capital messuage, or mansion-house, &c. &c., were, and now stand, settled, limited, and assured, To the use of such person or persons, for such estate or estates, interests, ends, intents, and purposes, and with, under, and subject to such powers, provisoes, limitations, declarations, and agreements, and in such sort, manner, and form, as the said Francis Frederick and William Frederick from time to time, or at any time or times, by any deed or deeds, instrument or instruments in writing, with or without power or revocation and new appointment, to be by them sealed and delivered in the presence of, and attested by, two or more credible witnesses, shall jointly direct, limit, or appoint; and in default of such joint direction, limitation, or appointment, to such uses as in the same indenture of release are mentioned of and concerning the same premises.

And whereas a marriage hath been agreed upon, and is intended to be shortly had and solemnized between the said William Frederick and Grace Griffith ; and upon the treaty

The intended marriage;

and the agreement for a settlement.

for, and in consideration of, the said intended marriage, the said Francis Frederick and William Frederick did propose and agree, that the said manor, messuages, lands, advowson, tenements, and hereditaments hereinbefore mentioned, with the appurtenances, should be conveyed, limited, and assured to, for, and upon the uses, trusts, intents, and purposes, and under and subject to the powers, provisoes, declarations, and agreements hereinafter limited, declared, and contained of and concerning the same.

The appointment.

Now this Indenture Witnesseth, That in pursuance of the said recited proposal and agreement, and in consideration of the said intended marriage, they the said Francis Frederick and William Frederick, in pursuance of the power or authority to them given, limited, or reserved in and by the said indenture of release as aforesaid, and by force and virtue thereof, and of every other power and authority to them given or reserved, in them vested, or them in any wise enabling in this behalf, Do by this deed or instrument in writing, by them sealed and delivered in the presence of, and attested by, two credible witnesses, direct, limit, and appoint, that the said manor, messuages, lands, tenements, advowson, hereditaments, and premises comprised in the said indentures of lease and release, and hereinbefore described, with their,

and every of their rights, members, and appurtenances, shall henceforth remain, continue, and be, and that the said indenture of release of the day of and the said common recovery thereupon suffered; and the full force and effect of the same, and every of them, shall operate, be, and enure, and that the said William Andrews (the demandant in the said recovery named), and his heirs, shall stand and be seised of the said manor, messuages, lands, tenements, advowson, hereditaments, and premises, and every of them, and every part and parcel thereof, To, for, and upon the uses, trusts, intents, and purposes, and under and subject to the powers, provisoes, declarations, and agreements hereinafter expressed, declared, and contained of and concerning the same.

And this indenture further witnesseth, ^{The grant and release.} That in further pursuance of the said recited agreement, and in consideration of the said intended marriage, and of the sum of five shillings of lawful money of Great Britain by the said Henry Howard and Henry Hunt in hand paid to the said Francis Frederick and William Frederick, at or before the sealing and delivery of these presents (the receipt whereof is hereby acknowledged); They the said Francis Frederick and William Frederick have, and each of them hath granted, bargained, sold, released, and confirmed, and

by these presents do, and each of them doth grant, bargain, sell, release, and confirm unto the said Henry Howard and Henry Hunt (in their actual possession now being by virtue of a bargain and sale to them thereof made by the said Francis Frederick and William Frederick, in consideration of five shillings, by indenture bearing date the day next before the day of the date of these presents, for the term of one whole year, commencing from the day next before the day of the date of the same indenture of bargain and sale, and by force of the statute made for transferring uses into possession), and to their heirs, all and every the said manor, messuages, lands, tenements, advowson, hereditaments, and premises comprised in the same indentures of lease and release, and hereinbefore described; with their and every of their rights, members, and appurtenances; and the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits thereof, and of every part and parcel thereof; and all the estate, right, title, interest, trust, property, claim, and demand whatsoever of them the said Francis Frederick and William Frederick, and of each of them, in, to, and out of the same premises, and every of them, and every or any part or parcel thereof.

Habendum.

To Have and To Hold the said manor and other hereditaments hereby granted and re-

leased, or expressed or intended so to be with their and every of their rights, members, and appurtenances, unto the said Henry Howard and Henry Hunt and their heirs for ever; nevertheless, to, for, and upon the uses, trusts, intents, and purposes, and under and subject to the powers, provisoes, declarations, and agreements hereinafter limited, expressed, declared, and contained of and concerning the same; (that is to say,)

Until the said intended marriage shall take effect and be solemnized, To such and the same uses, upon and for such and the same trusts, intents, and purposes, and under and subject to such and the same powers, provisoes, declarations, and limitations, as the said manor, and other hereditaments, at the time of, or immediately before the execution of these presents, were or stood limited, settled, and assured; and from and after the solemnization of the said intended marriage,

Until marriage, to the uses previously existing.

After the marriage, to the uses following.

To the use, intent, and purpose, that the said William Frederick and his assigns shall and may, during the joint lives of himself and the said Francis Frederick, by and out of the said manor and other hereditaments, have, receive, and take the yearly rent or annual sum of £ of lawful money of Great Bri-

To the intent that the intended husband may receive a rent-charge during the joint lives of himself and his father.

tain, free from taxes, and without any other deduction whatsoever, the said yearly rent or annual sum of £ to be paid and payable to him the said William Frederick and his assigns, during the joint lives of himself and the said Francis Frederick, at or in the common dining-hall of Lincoln's Inn, in the said county of Middlesex, by quarterly payments, on the days hereafter mentioned ; (that is to say,) the twenty-fifth day of December, the twenty-fifth day of March, the twenty-fourth day of June, and the twenty-ninth day of September, in every year, by even and equal portions ; the first payment thereof to begin and be made on such of the same days of payment as shall first happen after the solemnization of the said intended marriage :

And to the intent, that the wife may receive a rent-charge for her life, in bar of dower, in case she shall survive her husband.

And to this further use, intent, and purpose, that the said Grace Griffith (in case she shall survive the said William Frederick her intended husband), and her assigns, shall and may, from and after the decease of the said William Frederick, yearly and every year, during the then remainder of her natural life, have, receive, and take, by and out of the said manor and other hereditaments, the yearly rent, or annual sum of £ of lawful money of Great Britain, free from taxes, without any other deduction whatsoever, and such yearly rent, or annual sum of £ to be in full for

the jointure of the said Grace Griffith, and in lieu, bar, and satisfaction of and for her whole dower or thirds, at common law, or by or on account of custom or free bench, which she can or may, or otherwise might or could have or claim in or out of all and every, or any of the freehold, copyhold, or customary manors, messuages, lands, tenements, and hereditaments, whereof or whereunto the said William Frederick now is, or at any time or times during the said intended coverture shall be seised or entitled, for any estate of freehold, or copyhold of inheritance, or to which dower or free bench is incident; and to be paid to the said Grace Griffith, or her assigns, at or in the common dining-hall of Lincoln's Inn, in the county of Middlesex, by quarterly payments, on the days hereinbefore mentioned; the first quarterly payment thereof to begin and be made on such of the said days as shall first happen after the decease of the said William Frederick.

And to and for this further use, intent, ^{Power of distraining.} and purpose, that in case any quarterly payment or payments of either of the said yearly rents, or annual sums of £ and £ so payable for the time being as aforesaid, or any part thereof, shall at any time or times be in arrear or unpaid by the space of fourteen days next over or after any of the said days where-

on the same ought to be paid as aforesaid; then, and so often as the same shall happen, it shall and may be lawful for the person or persons for the time being entitled to the yearly rent or annual sum, the quarterly payment whereof shall be so in arrear as aforesaid, into and upon the said manor and other hereditaments, and into and upon every, or any part or parcel thereof, to enter, and distrain for the same yearly rent or annual sum; and the distress and distresses, then and there found, to take, lead, drive, carry away, and impound, and in pound to detain and keep until the yearly rent or annual sum so behind and unpaid, and all arrears thereof, together with all costs, charges, and expenses occasioned and incurred by taking and keeping such distress or distresses, shall be fully paid and satisfied; and in default of payment thereof, or of any part thereof, in due time after such distress or distresses shall be taken, to appraise, sell, and dispose of, or cause to be appraised, sold, and disposed of, such distress or distresses, or otherwise to act therein according to the due course of law, in like manner as in cases of distress taken for non-payment of rent reserved upon common leases; to the intent, that thereby and therewith, or otherwise, the yearly rent or annual sum so behind and unpaid as aforesaid, and all arrears thereof, and all costs, charges, and expenses attend-

ing the non-payment and recovery of the same, shall and may be fully paid and satisfied.

And to and for this further use, intent, and Power of entry. purpose, that in case any quarterly payment or payments of the said yearly rents, or annual sums of £ and £ or either of them, or any part thereof, shall at any time or times be in arrear or unpaid, by the space of twenty-eight days next over or after any of the said days hereinbefore mentioned and appointed for payment thereof; then, and so often as the same shall happen (although no formal or legal demand thereof shall be made), it shall and may be lawful for the person or persons for the time being entitled to the yearly rent or annual sum, the quarterly payment whereof shall be so in arrear, into and upon all and singular the said manor and other hereditaments, or into and upon any part thereof, in the name of the whole, to enter, and the same to have, hold, occupy, possess, and enjoy, and the rents, issues, and profits thereof, and of every part thereof, to have, receive, and take to and for his, her, or their own use and benefit, until he, she, or they shall thereby and therewith, or by any other means, be fully paid and satisfied the yearly rent or annual sum so behind and unpaid, and all arrears thereof, and all such arrears of the same as shall grow due or incur during the time that he, she, or they shall by virtue of

such entry or entries, be in possession of the premises, or any part thereof; together with all costs, charges, and expenses whatsoever attending, or occasioned by, the non-payment or recovery of the same, or any part thereof, or in relation thereto; such possession, when taken, to be without impeachment of waste.

And subject to the aforesaid rents-charge and powers, to the use of trustees for two hundred years.

And as for and concerning the said manor, messuages, lands, tenements, and hereditaments hereby appointed and released, or expressed or intended so to be, from and immediately after the solemnization of the said intended marriage (subject to, and charged and chargeable with, the said yearly rents or annual sums of £ and £ or such of them as, according to events, shall be payable for the time being as aforesaid, and to the remedies and powers hereinbefore given and provided for securing the same respectively),

To the use of the said John Jones and James Impey, their executors, administrators, and assigns, for and during, and unto the full end and term of two hundred years thence next ensuing, and fully to be complete and ended, without impeachment of waste; upon and for the trusts, intents, and purposes, and under and subject to the powers, provisoes, declarations, and agreements hereinafter expressed, declared, and contained of and concerning the same term;

and from and immediately after the end, expiration, or sooner determination of the said term of two hundred years, and in the mean time subject thereto, and to the trusts thereof,

To the use of the said Francis Frederick and his assigns, for and during the term of his natural life, without impeachment of or for any manner of waste ; and from and immediately after the determination of that estate by forfeiture, or otherwise, in his lifetime,

Remainder to the use of the father for life ;

To the use of the said Henry Howard and Henry Hunt and their heirs, during the life of the said Francis Frederick, in trust to support and preserve the contingent uses and estates hereinafter limited from being defeated or destroyed : and for that purpose to make entries and bring actions, as occasion may require ; but nevertheless to permit and suffer the said Francis Frederick and his assigns, during his life, to receive and take the rents, issues, and profits of the premises, to and for his and their own use and benefit ; and from and immediately after his decease.

Remainder to the use of trustees, to preserve contingent remainders ;

To the use of the said William Frederick and his assigns, for and during the term of his natural life, without impeachment of or for any manner of waste ; and from and im-

Remainder to the use of the intended husband for life ;

mediately after the determination of that estate by for feiture, or otherwise, in his lifetime,

Remainder to the use of trustees, to preserve contingent remainders ;

To the use of the said Henry Howard and Henry Hunt and their heirs, during the life of the said William Frederick, in trust to preserve and support the contingent uses and estates hereinafter limited from being defeated or destroyed ; and for that purpose to make entries and bring actions, as occasion may require : but nevertheless to permit and suffer the said William Frederick and his assigns, during his life, to receive and take the rents, issues, and profits of the premises to and for his and their own use and benefit ; and from and immediately after the decease of the survivor of them the said Francis Frederick and William Frederick,

Remainder to the use of trustees for five hundred years ;

To the use of the said Launcelot Lyon and Luke Lucas, their executors, administrators, and assigns, for and during, and unto the full end and term of five hundred years thence next ensuing, and fully to be complete and ended, without impeachment of or for any manner of waste ; nevertheless upon and for the several trusts, intents, and purposes, and under and subject to the several powers, provisoes, declarations, and agreements hereinafter expressed, declared, and contained of and concerning the same term ; and from and after the end, expiration, or sooner determin-

ation of the said term of five hundred years,
and in the mean time subject thereto, and to
the trust thereof,

'To the use of the first son of the body of the said William Frederick on the body of the said Grace Griffith, his intended wife, lawfully to be begotten, and the heirs male of the body of such first son lawfully issuing ; and for default of such issue,

Remainder to the use of the first son of the intended marriage in tail male ;

To the use of the second, third, fourth, fifth, sixth, and all and every other the son and sons of the body of the said William Frederick on the body of the said Grace Griffith, his intended wife, lawfully to be begotten, severally, successively, and in remainder, one after another, as they and every of them, shall be in seniority of age and priority of birth, and of the several and respective heirs male of the body and bodies of all and every such son and sons lawfully issuing ; the elder of such sons, and the heirs male of his body issuing, being always to be preferred, and to take before, the younger of such sons, and the heirs male of his and their body and respective bodies issuing ; and for default of such issue,

Remainder to the use of the second and other sons of the marriage in tail male ;

To the use of the first son of the body of the said William Frederick on the body of any other wife lawfully to be begotten, and

Remainder to the use of the first son by any other wife, in tail male ;

the heirs male of the body of such first son lawfully issuing ; and for default of such issue,

Remainder to the use of the second and other sons by any other wife in tail male ;

To the use of the second, third, fourth, fifth, sixth, and all and every other the son and sons of the said William Frederick on the body of any such other wife or wives lawfully to be begotten, severally, successively, and in remainder, one after another, as they, and every of them, shall be in seniority of age and priority of birth, and of the several and respective heirs male of the body and bodies of all and every such son and sons lawfully issuing ; the elder of such sons, and the heirs male of his body issuing, being always to be preferred, and to take before, the younger of such sons, and the heirs male of his and their body and respective bodies issuing ; and for default of such issue,

Remainder to the use of the daughters of the intended marriage, as tenants in common in tail general.

To the use of all and every the daughter and daughters of the said William Frederick on the body of the said Grace Griffith, his intended wife, lawfully to be begotten, equally to be divided between or amongst them, share and share alike, as tenants in common, and not as joint tenants, and of the several and respective heirs of the body and bodies of all and every such daughter and daughters lawfully issuing ; and in case there shall be a failure of issue of any one or more of

Cross remainders between them.

such daughters, then as well as to the original share or shares of, as the share or shares surviving or accruing to, such last-mentioned daughter or daughters, or her or their issue, to the use of all and every other the daughter and daughters of the said William Frederick on the body of the said Grace Griffith lawfully to be begotten, to be divided between or among them, if more than one, share and share alike, as tenants in common, and not as joint tenants, and of the several and respective heirs of their bodies issuing; and in case all such daughters, but one, shall happen to die without issue, or if there shall be but one such daughter, then to the use of such surviving or only daughter, and the heirs of her body lawfully issuing; and for default of such issue,

To the use of all and every the daughter and daughters of the said William Frederick on the body of any other wife or wives lawfully to be begotten, equally to be divided between or amongst them, share and share alike, as tenants in common, and not as joint tenants, and of the several and respective heirs of the body and bodies of all and every such daughter and daughters lawfully issuing; and in case there shall be a failure of issue of any one or more of such daughters, then as well as to the original share or shares of, as to the share or shares surviving or ac-

Remainder to the use of the daughters by any other marriage in like manner.

cruing to, such last-mentioned daughter or daughters, or her or their issue, to the use of all and every other the daughter and daughters of the said William Frederick, on the body of any such other wife or wives lawfully to be begotten, to be divided between or among them, if more than one, share and share alike, as tenants in common, and not as joint tenants, and of the several and respective heirs of their bodies issuing; and in case all such daughters, but one, shall happen to die without issue, or if there shall be but one such daughter, then to the use of such surviving or only daughter, and of the heirs of her body lawfully issuing; and for default of such issue,

To the use of the said Francis Frederick, his heirs and assigns for ever.

Trusts declared
of the term of
200 years;

And as to, for, and concerning the said term of two hundred years hereinbefore limited in use to the said John Jones and James Impey, their executors, administrators, and assigns as aforesaid, it is hereby agreed and declared between and by the said parties hereto, that the same is so limited to them upon and for the trusts, intents, and purposes, and under and subject to the powers, provisoes, declarations, and agreements hereinafter expressed, declared, and

contained of and concerning the same ; (that is to say,)

Upon trust, in case, and so often as, any in trust in the first place for further securing the two rents-charge.
quarterly payment or payments of the said
yearly rents or annual sums of £ and
£ so payable respectively for the time
being as aforesaid, or either of them, or any
part thereof respectively, shall be behind and
unpaid by the space of forty days next over,
or after, any of the said days hereinbefore
appointed for payment of the same respec-
tively (although no formal or legal demand
thereof shall be made); then, and so often as
the same shall happen, that they the said
John Jones and James Impey, or the survivor
of them, or the executors, administrators, or
assigns of such survivor, shall and do from
time to time, by and out of the rents, issues,
and profits of the said manor and other here-
ditaments comprised in the said term of two
hundred years, or by demising, leasing, sell-
ing, or mortgaging the same premises, or any
of them, or any part thereof, for all, or any
part of, the same term, or by bringing actions
against the tenants or occupiers of the same
premises, or any of them, for the rents then
in arrear, or by such other ways or means as
to them or him shall seem meet, raise and
levy such sum and sums of money as shall
be sufficient from time to time to pay and sa-
tisfy such arrears of the said yearly rents or

annual sums of £ and £
 or either of them, or so much thereof as shall
 from time to time happen to be in arrear and
 unpaid; together with all loss, costs, charges,
 damages, and expenses, which the said John
 Jones and James Impey, or the survivor of
 them, or the executors, administrators, or as-
 signs of such survivor, and the person or per-
 sons for the time being respectively entitled
 to such arrears as aforesaid, shall sustain, ex-
 pend, or be put unto, for or by reason of the
 non-payment of the same yearly rents or an-
 nual sums of £ and £ or
 either of them, or any part thereof, at the
 days and times, and in manner before ap-
 pointed for the payment thereof respectively;
 and shall and do pay, apply, and dispose of
 the same monies accordingly.

And in trust,
 in case the in-
 tended husband
 shall die in his
 father's life-
 time, to raise
 money for the
 maintenance of
 the children of
 the marriage.

And upon further trust, in case the said
 William Frederick shall die in the lifetime of
 the said Francis Frederick, and there shall be
 one or more child or children of the said Wil-
 liam Frederick, on the body of the said
 Grace Griffith to be begotten, born in his
 lifetime, or in due time after his decease, then,
 and in such case, that the said John Jones
 and James Impey, or the survivor of them,
 or the executors, administrators, or assigns of
 such survivor, shall and do, during the then
 remainder of the life of the said Francis Fre-
 derick (subject and without prejudice to the

raising and paying the said yearly rent or annual sum of £ and to the remedies and powers for recovering the same as aforesaid), by and out of the annual rents and profits of the said manor and other hereditaments, comprised in the said term of two hundred years, levy and raise for the maintenance, support, and education of such child or children, the yearly sum or sums of money hereinafter mentioned; (that is to say,) in case there shall be but one such child, then the yearly sum of one hundred pounds; and in case there shall be two such children, and no more, then the yearly sum of one hundred and fifty pounds, to be equally divided between them, share and share alike; and in case there shall be three or more such children, then the yearly sum of two hundred pounds, to be equally divided among them, share and share alike; and shall and do, at their or his discretion, either themselves pay and apply such sum or sums for the maintenance, support, and education of such child or children accordingly, or shall and do (if they the said trustees or trustee for the time being shall think proper) pay such sum or sums of money to the guardian or guardians for the time being of such child or children, to be by such guardian or guardians applied for or towards the maintenance, support, and education of such child or children respectively; and it is hereby agreed and declared,

that such respective sums for maintenance as aforesaid shall be paid by quarterly payments on the days of payment hereinbefore mentioned, in every year, by equal portions; the first payment thereof to begin and be made on such of the said days, as shall first happen after the decease of the said William Frederick, dying in the lifetime of the said Francis Frederick as aforesaid.

Survivorship.

Provided always, that in case any of the said children, who shall become entitled to the provision for maintenance as last hereinbefore mentioned, shall afterwards die in the lifetime of the said Francis Frederic, then the share of each such child so dying of and in such provision of maintenance as aforesaid, shall devolve upon, and vest in the survivors or survivor of them, in augmentation of, and in addition to, his, her, or their original share or shares thereof, as aforesaid; but so that the provision of maintenance for no one such child shall exceed the yearly sum of one hundred pounds, nor for two such children the yearly sum of one hundred and fifty pounds between them.

In trust to permit the persons next in remainder to receive the overplus of the rents.

And upon further trust, that they the said John Jones and James Impey, and the survivor of them, and the executors, administrators, and assigns of such survivor, shall and do permit and suffer the person or per-

sons, to whom the next or immediate reversion or remainder expectant upon the determination of the said term of two hundred years, of and in the premises therein comprised, shall, for the time being, belong, to receive and take the rents and profits, or the surplus of the rents and profits, which shall remain after, and not be applied in or towards the execution and performance of the trusts hereby declared of the same term of two hundred years.

Provided also, and it is hereby agreed and declared between and by the said parties hereto, that when the trusts hereinbefore declared of and concerning the said term of two hundred years shall have been executed and performed, or satisfied, or shall have become unnecessary, or incapable of taking effect, and the costs and charges (if any) of the trustees of the same term, their executors, administrators, and assigns, in and about the execution and performance of the same trusts, shall have been fully paid and satisfied (and which they are hereby respectively authorized and empowered to levy and raise by all or any of the ways and means aforesaid, and to retain accordingly); then, and immediately thenceforth, the said term of two hundred years of and in the premises therein comprised, or so much thereof as shall remain unsold and un-

Cesser of this term.

disposed of for the purposes aforesaid shall cease, determine, and be absolutely void.

Trust declared
of the term of
five hundred
years.

And as, to, for, and concerning the said term of five hundred years hereinbefore limited in use to the said Launcelot Lyon and Luke Lucas, their executors, administrators, and assigns as aforesaid, it is hereby agreed and declared between and by the said parties hereto, that the same is so limited to them upon and for the trusts, intents, and purposes, and under and subject to the powers, provisions, declarations, and agreements hereinafter expressed, declared, and contained of and concerning the same term ; (that is to say,)

In trust for
raising portions
for younger
children.

Upon trust, in case there shall be any child or children of the said William Frederick on the body of the said Grace Griffith, his intended wife, to be begotten, other than, or not being an eldest or only son for the time being entitled, under the limitations hereinbefore contained, to the said manor and other hereditaments, for an estate tail in possession, or in remainder immediately expectant upon the decease of the survivor of the said William Frederick and Francis Frederick; then that they the said Launcelot Lyon and Luke Lucas, or the survivor of them, or the executors, administrators, or assigns of such survivor, shall and do either in the lifetime of the said William Frederick with his con-

sent in writing, or else not till after his decease (but subject and without prejudice to the life estate of the said Francis Frederick, and to the raising and paying the said yearly rent-charge or sum of £ hereinbefore limited in use to the said Grace Griffith for her life, and to such remedies for recovering the same as aforesaid), by demise, sale, or mortgage of the said manor and other hereditaments comprised in the same term of five hundred years, or of a competent part thereof for all or any part of the same term, or by and out of the annual rents, issues, and profits thereof, or by bringing actions against the tenants or occupiers of the same premises, or any of them, for the rents then in arrear, or by all or any of the said ways or means, or by such other ways or means, as they the said Launcelot Lyon and Luke Lucas, or the survivor of them, or the executors, administrators, or assigns of such survivor, shall think fit, raise and levy, or borrow and take up at interest, for the portion or portions of such child or children, other than, or not being any of them an eldest or only son for the time being entitled as aforesaid, the sum or sums of money hereinafter mentioned ; (that is to say,) if there shall be but one such child, not being an eldest or only son entitled as aforesaid, the sum of three thousand pounds of lawful money of Great Britain, as and for the portion of such one child and to be paid

If but one younger child, or daughter, £3000, to be paid according to the appointment of the husband.

and payable to, and to become vested in, such one child, at or upon such age, day, or time as the said William Frederick, by any deed or writing, with or without power of revocation and new appointment, to be sealed and delivered by him in the presence of, and attested by, two or more credible witnesses, or by his last will and testament in writing, or any codicil or codicils thereto, to be by him signed and published in the presence of, and attested by, three or more credible witnesses, shall direct or appoint; and in default of such direction or appointment, to be an interest vested in such child, being a younger son, at his age of twenty-one years, or being a daughter, at her age of twenty-one years, or day of marriage (which shall first happen); and to be paid to him or her at or upon such age or time accordingly, if the same shall happen after the decease of the said William Frederick ; but if the same shall happen in his lifetime, then the same shall be paid immediately after his decease, unless he shall signify his consent in writing, under his hand and seal, that the same shall be raised and paid in his lifetime ; and if there shall be two or more such children, other than, or not being any of them an eldest or only son entitled as aforesaid, then the sum of five thousand pounds of lawful money of Great Britain, for the portions of such two or more children ; the said sum of five thousand pounds to be

If two or more,
£5000.

shared and divided between or among such children not being an eldest or only son, entitled as aforesaid, in such parts or proportions, and to vest in, and be paid to, such children respectively, at or upon such ages, days, or times, and to be subject to such charges, provisoes, and limitations for the benefit of some or one of the said children, and in such manner, as the said William Frederick, by any deed or deeds, instrument or instruments, in writing, with or without power of revocation and new appointment, to be by him sealed and delivered in the presence of, and attested by, two or more credible witnesses, or by his last will and testament in writing, or any codicil or codicils thereto, to be signed and published by him in the presence of, and attested by, three or more credible witnesses, shall direct or appoint; and in default of such direction or appointment, to be equally divided between or among such children, other than, or not being any of them an eldest or only son entitled as aforesaid, share and share alike; the share or respective shares of such of the said children as shall be a younger son or sons, to become a vested interest or vested interests in him or them respectively, at his or their age or respective ages of twenty-one years; and the share or shares of such of them as shall be a daughter or daughters, to become a vested interest or vested interests in her or them re-

spectively, at her or their age or respective ages of twenty-one years, or day or respective days of her or their marriages or respective marriages (which shall first happen), and to be paid and payable at or upon the same ages, days, or times accordingly, in case the same shall happen after the decease of the said William Frederick; but in case the same shall respectively happen in the lifetime of the said William Frederick, then the same shall be paid immediately after his decease, unless he shall signify such consent as aforesaid, that the same, or any of them, shall be raised and paid in his lifetime.

No mortgage or sale to be made in the lifetime of the father.

Provided always, that no sale or mortgage, for raising such portion or portions, as hereinbefore mentioned, of the said manor and other hereditaments, or any of them, or any part thereof, shall be made in the lifetime of the said Francis Frederick, unless with his consent and approbation, testified in writing under his hand and seal.

Provision in case of a partial appointment.

Provided always, and it is hereby agreed and declared between and by the said parties hereto, that in case any appointment shall be made in pursuance of the powers aforesaid, or either of them, which shall only extend to a part or parts of the sum or sums of money hereby intended for the portion or portions of such child or children, other than or not being

an eldest or only son, entitled as aforesaid, such appointment shall be valid and effectual, notwithstanding the non-appointment of the remaining part or parts of such portion or portions; but in that case, any child entitled to a portion or share under such appointment, shall be entitled to no further share of and in the remaining or unappointed part or parts of the monies hereby intended for portions as aforesaid, until he or she shall have brought his or her appointed share into hotchpot, and shall have accounted for the same accordingly; unless the said William Frederick shall declare a contrary intention in writing.

And upon further trust, that they the said Launcelot Lyon and Luke Lucas, and the survivor of them, and the executors, administrators, and assigns of such survivor, shall and do in the mean time from and after the decease of the said William Frederick, and until the portion or portions hereby intended for daughters and younger sons, as aforesaid, shall respectively become payable as aforesaid (but subject and without prejudice as aforesaid), by and out of the annual rents and profits of the said manor and other hereditaments comprised in the said term of five hundred years, levy and raise, for the maintenance and education of such child or children, not being any of them an eldest or only son, such yearly sum and sums of money as

Provision for
maintenance.

hereinafter mentioned ; (that is to say,) until such child or children shall respectively attain the age of twelve years, such yearly sum for each of them as will be equivalent to the interest of the portion hereby intended for him or her as aforesaid, after the rate of two pounds for every one hundred pounds by the year ; and from and after the age of twelve years, and until such portion or respective portions shall become payable, such yearly sum for each such child as will be equivalent to the interest of the portion hereby intended for him or her as aforesaid, after the rate of four pounds for every one hundred pounds by the year ; and also shall and do, at their or his discretion, either themselves pay and apply such sums for the maintenance and education of such child or children accordingly, or shall and do (if they the said trustees or trustee for the time being shall think proper) pay the said several sums of money to the guardian or guardians for the time being of such child or children, to be by such guardian or guardians applied for or towards the maintenance and education of such child or children respectively ; and it is hereby agreed and declared, that such respective sums for maintenance as aforesaid, shall be paid by quarterly payments on the days of payment hereinbefore mentioned, in every year, by equal portions ; the first payment thereof to begin and be made on such of the

said days, as shall first happen after the decease of the said William Frederick.

Provided always, and it is hereby agreed ^{Survivorship.} and declared between and by the said parties hereto, that if there shall be more than one such child, for whom portions are hereby provided as aforesaid, and any of them being a younger son or sons, shall depart this life, or become an eldest or only son, under the age of twenty-one years, or, being a daughter or daughters, shall depart this life, under that age, without being or having been married; then, and in such case, and in default of, and subject to any such appointment as aforesaid, the portion hereby intended to be provided for each such daughter, and for each such son so dying, or becoming an eldest or only son, or so much, and such part thereof, as shall not be sooner advanced for any younger son or sons as hereinafter mentioned, shall accrue and belong to the survivor or survivors, and other or others of such children (not being an eldest or only son, entitled as aforesaid), and shall vest in and be paid to him, her, or them (if more than one), in equal parts and shares, at or upon such and the same ages, days, and times respectively, and in such and the same manner, as is hereinbefore declared, touching or concerning his, her, or their original portion or portions, or as near thereto as circumstances will permit; and

such benefit of survivorship and accruer shall extend as well to the surviving or accruing, as to the original portion or portions; but so nevertheless, that no one child shall by survivorship, or otherwise have or be entitled to more than the sum of £ for his or her portion.

Power to raise
money for the
advancement of
younger sons.

Provided always, and it is hereby agreed and declared between and by the said parties hereto, that it shall and may be lawful for the said Launcelot Lyon and Luke Lucas, or the survivor of them, or the executors, administrators, or assigns of such survivor, at any time or times during the life of the said William Frederick, with his consent and approbation signified by some deed or deeds, writing or writings, to be sealed and delivered by him in the presence of, and to be attested by, two or more credible witnesses, and at any time or times after his decease, at the discretion and of the proper authority of the said Launcelot Lyon and Luke Lucas, or the survivor of them, or the executors, administrators, or assigns of such survivor, to raise and levy, by all or any of the aforesaid ways or means (but subject nevertheless, and without prejudice as aforesaid), any sum or sums of money, in part of the portion or portions hereby intended for such of the said children as shall be a younger son or sons, and shall and do, with the consent in writing

of the said William Frederick during his life, and after his decease at their or his discretion, pay and apply the monies so to be raised for the purpose of placing or putting such younger son or sons, for whom, or in part of whose then presumptive portion or portions such sum or sums of money shall be raised, in or to any business, profession, or employment, or otherwise for his or their benefit or advancement in the world, notwithstanding his or their portion or portions shall not then have become payable as aforesaid; so nevertheless, that such sum or sums of money, so to be raised as last mentioned, shall not exceed one half part of the presumptive portion or portions of such son or sons respectively; and so nevertheless, that such sum or sums shall be considered and taken as a part of the portion or portions hereby provided for such son or sons, for whose benefit such sum or sums shall be raised as aforesaid.

And upon this further trust, that they the said Launcelot Lyon and Luke Lucas, and the survivor of them, and the executors, administrators, and assigns of such survivor, shall and do permit and suffer the person or persons, to whom the next or immediate reversion or remainder expectant upon the determination of the said term of five hundred years of and in the premises therein comprised, shall for the time belong, to receive

The persons next in remainder to receive the surplus of the rents.

the rents and profits, or the surplus of the rents and profits, which shall remain after, and not be applied in, or towards, the execution and performance of the trusts hereby declared of the said term of five hundred years.

Money advanced by the husband in his lifetime, to be considered as part of the portions.

Provided always, and it is hereby further agreed and declared between and by the said parties hereto, that in case the said William Frederick shall in his lifetime give or advance any sum or sums of money for or towards the preferment or advancement of any of the said children, being a younger son or sons, in the way of, or for the placing him or them in, any profession, business, or employment, or, being a daughter or daughters, in marriage; then, and in such case, if any such sum or sums of money so to be advanced shall be equal to, or exceed, the portion or portions hereinbefore intended to be provided for such child or children respectively, such advanced sum or sums shall be accounted in full for the portion or portions so as aforesaid intended to be provided for such child or children respectively; but if such advanced sum or sums shall be less than the portion or portions hereinbefore intended to be provided for such child or children respectively, then such advanced sum or sums shall be accounted as part of the portion or portions so as aforesaid provided or intended for such

child or children respectively; unless he the said William Frederick shall declare the contrary thereof respectively by any writing under his hand^a.

Provided also, and it is hereby further agreed and declared between and by the said parties hereto, that when the trusts hereinbefore declared of and concerning the said term of five hundred years, shall have been executed and performed, or satisfied, or shall have become unnecessary, or incapable of taking effect, and the costs and charges (if any) of the trustees of the same term, their executors, administrators, and assigns, in and about the execution and performance of the same trusts, shall have been fully paid and satisfied (and

Cesser of the term.

^a If a father advances a child under this clause, the effect of such advancement is not clear; whether the sum advanced is to be kept on foot as part of the personal estate of the father; whether the other children are to be entitled to the whole sum directed to be raised in exclusion of the child advanced (Folkes v. Western, 9 Ves. 456); or whether so much of the original sum directed to be raised as will be equal to the sum advanced, will be extinguished for the benefit of the persons in remainder (Pitfield's case, 2 P. W. 513.)? It is, therefore, proper

to add the following clause:
 "and in case any child or
 " children shall be so ad-
 " vanced, as aforesaid, by
 " the said
 " he the said
 " shall (unless he shall de-
 " clare a contrary intention
 " in writing) stand in the
 " place of the child, or chil-
 " dren, so advanced as afore-
 " said, in respect of the sum
 " or sums of money, so by
 " him given by way of ad-
 " vancement as aforesaid,
 " and, to the extent of such
 " advancement, shall be con-
 " sidered as a purchaser of
 " the share or shares of
 " such child or children."

which they are hereby respectively authorized and empowered to levy and raise by all or any of the ways and means aforesaid, and to retain accordingly); then, and immediately thenceforth, the said term of five hundred years of and in the premises therein comprised, or so much thereof as shall remain unsold and undisposed of for the purposes aforesaid, shall cease, determine, and be absolutely void.

Power enabling
the intended
husband to
make a jointure on any after-taken wife.

Provided also, and it is hereby further agreed and declared between and by the said parties hereto, that if the said Grace Griffith shall die in the lifetime of the said William Frederick, then, and in such case, it shall and may be lawful for the said William Frederick, either before or after his marriage with any woman or women, whom he shall thereafter marry, by any deed or deeds, instrument or instruments, in writing, with or without power of revocation and new appointment, to be by him sealed and delivered in the presence of, and attested by, two or more credible witnesses, or by his last will and testament in writing, or any codicil or codicils thereto be by him signed and published in the presence of, and attested by, three or more credible witnesses (but subject nevertheless, and without prejudice to the said term of two hundred years, and the trusts thereof, and to the estate hereby limited to the said Francis

Frederick for his life of and in the aforesaid manor and other hereditaments), to limit and appoint unto, or to the use of, or in trust for, any woman or women, whom the said William Frederick shall after the decease of the said Grace Griffith happen to marry, for her or their life or respective lives, and for her or their jointure or respective jointures, and in bar, or without being in bar, of her or their dower, any annual sum, or yearly rent-charge, or annual sums, or yearly rents-charge, not exceeding for any such woman the sum of £ of lawful money of Great Britain, free from taxes, and without any other deduction whatsoever, to be issuing out of, and charged and chargeable upon, all or any part or parts of the said manor and other hereditaments expressed to be hereby appointed and released, and to limit and appoint to the woman or women respectively to or for the benefit of whom such annual sum or yearly rent-charge, or annual sums or yearly rents-charge, shall be appointed as aforesaid, usual powers and remedies for recovering and enforcing payment thereof when in arrear, by distress and entry upon, and perception of the rents and profits of the hereditaments which shall be so charged with the said annual sum or yearly rent-charge, or annual sums or yearly rents-charge, and also to limit and appoint the hereditaments

which shall be so charged as aforesaid (subject and without prejudice as aforesaid), to any person or persons, his or their executors, administrators, and assigns, for any term or terms of years, with or without impeachment of waste, upon such trusts, for better securing the payment of such yearly rent-charge, as to the said William Frederick shall seem meet; but so that upon the death of the woman, for the benefit of whom any such term shall be so limited, and the payment of the arrears of her rent-charge, and the expenses (if any) incurred by the non-payment thereof, the term to be limited for securing the said yearly rent-charge, or so much of the same term as shall not be disposed of under the trusts to be declared for securing the same yearly rent-charge, shall be made to cease and determine.

Power of
leasing.

Provided always, and it is hereby further agreed and declared, that it shall and may be lawful to and for the said Francis Frederick and William Frederick from time to time, during their joint lives, and after the decease of either of them, then to and for the survivor of them, from time to time during his life, and after the decease of such survivor, then to and for the guardian or guardians for the time being of any child or children of the said William Frederick, who, by virtue of, or under the limitations hereinbefore contained,

shall be entitled to the actual freehold or inheritance of the said hereditaments and premises, from time to time, during the minority of such child or children respectively, to demise or lease all or any part or parts of the said hereditaments and premises, with the appurtenances, to any person or persons for any term or number of years, not exceeding twenty-one years in possession, and not in reversion, or by way of future interest; so that there be reserved and made payable on every such lease, during the continuance thereof, the best and most improved yearly rent or rents, to go along with, and be incident to, the immediate reversion of the premises so to be leased, that can or may be reasonably had or gotten for the same, without taking any fine, premium, or foregift for the making thereof; and so that in every such lease there be contained a condition of re-entry on the non-payment of the rent or rents to be thereon, or thereby, respectively reserved by the space of twenty-one days next after the same shall become due and payable; and so that the lessee or the respective lessees, to whom such lease or leases shall be made, seal and deliver a counterpart or counterparts of such lease or leases; and so that none of the lessees, to whom any such lease or leases shall be made, be, by any clause or words therein contained, authorized to commit waste, or exempted from punishment for

committing waste ; any thing herein contained to the contrary thereof notwithstanding.

Clauses of indemnity.

Provided also, and it is hereby further agreed and declared between and by the said parties hereto, that the said several trustees, and each and every of them, their and each and every of their heirs, executors, administrators and assigns, shall be charged and chargeable only for so much money, as they and every of them shall respectively actually receive by virtue of, or under, the trusts aforesaid ; and that any one or more of them shall not be answerable for the other or others of them, nor for the acts, receipts, neglects, or defaults of the other or others of them ; but each of them for his own acts, receipts, neglects, and defaults only ; nor shall they or any of them be answerable or accountable for any person or persons, who is, are, or shall be the receiver or receivers of the rents and profits of the said hereditaments and premises, or any of them, or any part thereof ; or in whose hands the same, or any of the trustmonies, shall or may be deposited or lodged for safe custody ; nor for any misfortune, loss, or damage, which may happen in the execution of any of the aforesaid trusts, or in relation thereto, except the same shall happen by or through their own wilful neglects or defaults respectively ; and also that the said se-

veral trustees, and each and every of them, their and each and every of their heirs, executors, administrators, and assigns, shall and may, by and out of the monies which shall come to their respective hands by virtue of the trusts aforesaid, retain to, and reimburse themselves respectively, and also allow to their and his co-trustee and co-trustees, all loss, costs, damages, and expenses, which he or they, or any of them, shall or may respectively suffer, sustain, expend, disburse, or be put unto, or which shall or may be to him, them, or any of them, occasioned for, or on account, or by reason or means, of the trusts hereby in them reposed, or the management and execution thereof, otherwise howsoever relating thereto.

And the said Francis Frederick and William Frederick, for themselves, severally and respectively, and for their several and respective heirs, executors, and administrators, do hereby severally covenant, promise, and agree with and to the said Henry Howard and Henry Hunt, their heirs and assigns, in manner and form following ; (that is to say,) Covenant for the title.

That (for and notwithstanding any act, deed, matter, or thing whatsoever made, done committed, executed, or suffered by him the said Francis Frederick, or any of his ancestors, or by the said William Frederick, to the

contrary, they the said Francis Frederick and William Frederick now at the time of the sealing and delivery of these presents, have in themselves good right, full power, and lawful and absolute authority, to limit and appoint, grant, bargain, sell, release, and convey the manor, messuages, lands, advowson, tenements, hereditaments, and premises hereby limited and appointed, granted and released, or intended so to be, and every of them, and every part and parcel thereof, with their and every of their rights, members, and appurtenances, to the uses, and upon and for the trusts, intents, and purposes, and in manner and form aforesaid, according to the true intent and meaning of these presents :

And likewise, that the manor, messuages, advowson, lands, tenements, hereditaments, and premises hereby limited, appointed, granted, and released, or intended so to be, and every of them, and every part and parcel thereof, with their and every of their rights, members, and appurtenances, shall and lawfully may from time to time, and at all times hereafter, remain, continue, and be, to the several uses, upon the several trusts, and for the several intents and purposes, hereinbefore limited, created, expressed, and declared of and concerning the same, and shall and may be peaceably and quietly had, held, and enjoyed accordingly ; without the let, suit,

trouble, denial, eviction, ejection, disturbance, molestation, hindrance, interruption, claim, or demand whatsoever of, from, or by the said Francis Frederick and William Frederick, or either of them, or their, or either of their heirs, or any person or persons claiming, or to claim by, from, through, under, or in trust for them, or any of them, or any of the ancestors of the said Francis Frederick ;

And that free and clear, and freely, clearly, and absolutely acquitted, exonerated, and discharged, or otherwise by them the said Francis Frederick and William Frederick, or one of them, their or one of their heirs, executors or administrators, well and sufficiently saved, defended, kept harmless, and indemnified, of, from, and against all former, and other gifts, grants, bargains, sales, leases, mortgages, jointures, dowers, right and title of dower, uses, intails, trusts, wills statutes-merchant and of the staple, recognizances, judgments, extents, executions, rents, arrears of rent, annuities, legacies, sum and sums of money, yearly payments, forfeitures, re-entries, cause and causes of forfeiture and re-entry, debts of record, debts due to the king's majesty, and of, from, and against all and singular other titles, troubles, charges, and incumbrances whatsoever, made, done, executed, committed, or suffered by the said Francis Frederick and William Frederick, or

either of them, or any of the ancestors of the said Francis Frederick ;

And moreover, that they the said Francis Frederick, and William Frederick, and their heirs, and all and every other person or persons, having, or lawfully claiming, or who shall or may at any time or times hereafter have, or lawfully claim, any estate, right, title, interest, inheritance, property, or demand whatsoever, either at law or in equity, of, in, to, or out of the manor, messuages, lands, advowsons, tenements, hereditaments, and premises hereby limited and appointed, granted and released, or intended so to be, or of, in, to, or out of any of them, or any part or parcel thereof, by, from, under, or in trust for them, or any of them, or any of the ancestors of the said Francis Frederick, shall and will from time to time, and at all times hereafter, upon every reasonable request of the said Henry Howard and Henry Hunt, their heirs or assigns, but at the proper costs and charges in the law of the person or persons for the time being beneficially interested in the premises, make, do, acknowledge, levy, suffer and execute, or cause and procure to be made, done, acknowledged, levied, suffered and executed, all and every such further and other lawful and reasonable act and acts, thing and things, deed and deeds, devices, conveyances, and assurances in the law what-

soever, for the further, better, more perfectly, and absolutely granting, releasing, and assuring the manor, messuages, lands, advowson, tenements, hereditaments, and premises hereby limited and appointed, granted and released, or intended so to be, and every of them, and every part and parcel thereof, with their and every of their rights, members, and appurtenances, to the several uses, upon the several trusts, and for the several intents and purposes and under and subject to the several powers, provisoes, declarations, and agreements hereinbefore created, expressed, declared, and contained of and concerning the same, or such of them as shall then remain to be performed, and capable of taking effect; be the same by fine, feoffment, common recovery or recoveries, or other matter of record, or not of record, or otherwise howsoever; as by them the said Henry Howard and Henry Hunt, or the survivor of them, his heirs or assigns, or any of them, their or any of their counsel in the law, shall be reasonably advised, or devised, and required; so that such further assurance or assurances contain or imply in them no further or other covenant or warrantry than against the person or persons who shall make and execute the same, his, her, or their heirs, executors, and administrators' acts and deeds only; and so that the party or parties who shall be required to make and execute

any such further assurance or assurances, be not compelled, nor compellable, for the making or doing thereof, to go or travel from his, her, or their dwelling, or respective dwellings, or usual place or places of abode. In witness, &c.

THE following form of an appointment, by reference to the uses of a subsisting settlement, with the addition of new uses, and a provision for making the new uses subject to the powers created by reference, was prepared by the author's friend, Lewis Duval, Esq., and is published by his permission, and at the author's request.

This Indenture, &c. 1822.

BETWEEN Henry Thomson of &c. Esq. and William John Thompson, of &c. aforesaid Esq. (the eldest surviving son and heir apparent of the said Henry Thompson) of the first part; George Thompson, of &c. Esq. (the second surviving son of the said Henry Thompson) of the second part: G. C. Wilson of &c. spinster (the only child of Charles Edmund Wilson of &c. aforesaid Esq.) of the third part; and Edward Richards, of &c. Esq. and Henry John Jackson, of &c., Esq., Andrew B. Dixon and A. R. Dixon, both of &c. Esq. of the fourth part:

Whereas by an indenture of lease and an indenture of appointment and release, bearing date respectively on or about the 1st and 2d days of June, 1821, the appointment and release being made, or expressed to be made, between the said Henry Thompson of the first part, the said W. J. Thompson of the second part, Henry Salter, Esq. and William Baxter, Esq. of the third part, and the rev. George Roberts, Clerk, and the rev. Henry Maxwell, Clerk, of the fourth part, All that the castle of C. in the county of D.; And all that the manor or lordship, or reputed manor or lordship, of C. in the county of D.; And all that the borough of C. and all royalties, franchises, and other hereditaments to the said castle, manor, and borough respectively belonging, or situate within the said castle, manor, or borough, or within the parish of C. aforesaid, or the precincts or liberties thereof, whereof or wherein the said Henry Thompson and W. J. Thompson, or either of them, were or was at the time of the date and execution of a certain indenture of bargain and sale therein referred to, bearing date, &c. seised of any estate tail, at law, or in equity, And all &c. [*here describe the parcels*] with their and every of their rights, royalties, members, and appurtenances, were appointed, conveyed, or otherwise assured (subject, as to

the whole, or some part or parts of the same premises, to a yearly rent-charge of £600 devised or limited by the will of Henry Thompson, Esq. deceased, the father of the said Henry Thompson (party hereto), to Margaret Thompson, now the widow and relict of the said Henry Thompson deceased, for her life, and also to a yearly rent-charge of £800 theretofore created by the said Henry Thompson (party hereto) for Frances Thompson his wife, during her life, and to a yearly rent charge of £1000 created by the said Henry Thompson (party hereto), on the marriage of Edward Thompson, his third surviving son, for the honourable J. Thompson, now the wife of the said Edward Thompson, for her life, and to the powers and remedies, and terms of years, limited or created for securing or enforcing the payment of the same yearly rent-charges respectively,) To the uses, upon the trusts, and for the ends, intents, and purposes, and under, and subject, to the powers, provisoes, limitations, declarations, and agreements in the said indenture of appointment and release limited, expressed, and declared of and concerning the same, and in part hereinafter mentioned; (that is to say,) As to, for, and concerning the said manor or lordship, or reputed manor or lordship, of C. with its rights, royalties, members, and appurtenances in the said county of D. And all that &c.

To the use of the said Henry Thompson (party hereto), his heirs and assigns for ever; And, as, to, for, and concerning, all other the said manors or lordships, or reputed manors or lordships, boroughs, castles, advowsons, messuages, lands, tenements, hereditaments, and premises not hereinbefore limited, in use to the said Henry Thompson and his heirs, and every part of the same, with their rights, royalties, members, and appurtenances, To the use of such person or persons, for such estate or estates, and for such interest or interests, by way of annuity, rent-charge, or otherwise, and in such parts, shares, and proportions, and upon such trusts, and for such intents and purposes, and charged and chargeable in such manner, and either absolutely or conditionally, and subject to such powers of revocation and new appointment, and other powers, provisoes, conditions, restrictions, limitations, declarations, and agreements, as the said Henry Thompson (party hereto), and W. J. Thompson, jointly should at any time or times, and from time to time, by any deed or deeds to be sealed and delivered by them in the presence of one, two, or more credible witness or witnesses, and attested by the same witness or witnesses, direct, limit, or appoint; and in default of such direction, limitation, or appointment, and in the mean time, and from time to time, subject to such uses, es-

tates, trusts, charges, and interests, as should have been directed, limited, or appointed by the said Henry Thompson (party hereto,) and W. J. Thompson jointly as aforesaid, To the use, intent, and purpose that Frances Thompson, the wife of the said Henry Thompson, (party hereto,) in case she should survive the said Henry Thompson, (party hereto,) should, after the decease of the said Henry Thompson, (party hereto,) and thenceforth during her natural life, receive, take, and enjoy, one annual sum, or yearly rent-charge, of £700, to be issuing and payable out of, and charged and chargeable upon, all and singular the said manors or lordships, or reputed manors or lordships, and other hereditaments, with their appurtenances, except the said hereditaments limited in fee simple to the said Henry Thompson (party hereto), and to be payable, as in the said indenture of appointment and release is mentioned, with the usual powers and remedies of distress and entry, and detention of the possession and perception of the rents and profits of the same premises, for enforcing the payment of the same annual sum or yearly rent-charge of £700, when in arrear; And subject thereto, and also subject and without prejudice to the term of 500 years thereafter limited, and the trusts thereof, To the use of the said Henry Thompson (party hereto), and his assigns for his life, without impeach-

ment of waste ; with remainder to the use of the said H. Salter and W. Baxter, and their heirs during the natural life of the said Henry Thompson (party hereto), Upon Trust to support the contingent remainders ; with remainder to the use of the said George Roberts and H. Maxwell, their executors, administrators, and assigns, for the term of 500 years, without impeachment of waste, Upon the Trusts, and for the ends, intents, and purposes, thereinafter declared concerning the same ; with remainder to the use of the said William John Thompson and his assigns for his life, without impeachment of waste ; with remainder to the use of the said H. Salter and W. Baxter and their heirs, during the life of the said W. J. Thompson, Upon Trust to support the contingent remainders ; with remainder to the use of the first and every other son of the said W. J. Thompson severally, and successively according to their respective seniorities in tail male ; with remainder to the use of the said George Thompson and his assigns for his life, without impeachment of waste ; with remainder to the use of the said Henry Salter and W. Baxter, and their heirs during the life of the said George Thompson, Upon Trust to support the contingent remainders ; with remainder to the use of the first and every other son of the said George Thompson severally and successively, according to their respective se-

niorities, in tail male; with remainder to the use of the said Edward Thompson and his assigns during his life, without impeachment of waste; with several remainders over; and with the ultimate limitation to the said Henry Thompson (party hereto), in fee simple: And in the said indenture of appointment and release was contained (among other provisoes, agreements, and declarations) a proviso, agreement, and declaration, that it should be lawful for the said W. J. Thompson, George Thompson, and Edward Thompson, respectively, when by virtue of the limitations thereinbefore contained, they respectively should be in the actual possession, or entitled to the receipt of the rents and profits of, the said manors or lordships, or reputed manors or lordships, and other hereditaments, or any part thereof, by any deed or deeds, instrument or instruments in writing, with or without power of revocation, to be executed and attested as therein mentioned, or by their respective last wills and testaments in writing, or any codicil or codicils thereto, to be signed, and published, and attested as therein mentioned, to limit or appoint to, or to the use of, or in trust for, any woman or women, whom they respectively, and each of them, from time to time should marry, for the life or lives of such woman or women, for her or their jointure or jointures, and in bar, or without being in bar, of her

or their dower, or thirds at common law, or by custom, any annual sum or sums, yearly rent-charge, or rent-charges, not exceeding in the whole the clear yearly sum of £1500, for any one wife, and to be issuing out of, and charged and chargeable upon, all or any part or parts of the said manors or lordships, or reputed manors or lordships, and other hereditaments, and with such power and remedies by distress, and entry upon, and detention of the possession and perception of the rents and profits of, the same hereditaments, and such term or terms of years therein for better securing the due payment thereof respectively, as the person or persons making such appointment or appointments should think fit ; and such appointment or appointments to take effect immediately, or at any time after the determination of the estate of the person or persons respectively making such limitations or appointments, and such limitations or appointments to be made either before or after such intermarriage or intermarriages, as to the person or persons respectively, who should make such limitations or appointments, should seem meet ; And in the said indenture of appointment and release was also contained a proviso, agreement, and declaration, that it should be lawful for the said Henry Thompson (party hereto), by any deed or deeds, instrument or instruments in writing, with or without

power of revocation, to be executed and attested as therein mentioned, or by his last will or testament in writing, or any codicil or codicils thereto, to be signed and published and attested as therein mentioned, to limit or appoint to, or to the use of, or in trust for, any woman or women, with whom the said George Thompson might from time to time marry, or to his surviving wife, for the life or lives of such woman or women, for her or their jointure or jointures, and in bar, or without being in bar, of her or their dower, or thirds at common law, or by custom, any annual sum or sums, yearly rent-charge or rent-charges, not exceeding in the whole the clear yearly sum of £800, to be issuing out of, and charged and chargeable upon, all, or any part or parts of, the said manors or lordships, or reputed manors or lordships, and other hereditaments, with their rights, royalties, members, and appurtenances, with such powers and remedies by distress and entry upon, and detention of the possession and perception of the rents and profits of, the same hereditaments, and such term or terms of years therein, for better securing the due payment thereof respectively, as the said H. Thompson (party hereto) should think fit, and such appointment or appointments, to take effect from, and immediately or at any time after, the death of the said George Thompson, and whether he should or should

not become tenant for life in possession ; but the said annual sum of £800 a year, or so much thereof as might be appointed, should be, and should be deemed, a part satisfaction of the annual sum, which might be appointed by the said George Thompson, under his power thereinbefore contained; And such limitation or appointment to be made either before or after such intermarriage or intermarriages, and either before or after the person of the woman, who was to be the jointress, should be ascertained, as to the said Henry Thompson (party hereto) should seem meet ; And in the said indenture of appointment and release, are contained certain powers of leasing and of sale and exchange, with usual provisions for investing the monies to arise from sale, or to be received for equality of exchange, in the purchase of other estates, to be settled to the same uses, and for investing the same monies in the mean time, upon government or real securities ; And whereas a marriage hath been agreed upon, and is intended to be shortly had and solemnized, between the said George Thompson and the said G. C. Wilson ; And whereas upon the treaty for the said intended marriage, it was agreed (among other things), that the said Henry Thompson (party hereto), and W. J. Thompson, should, in exercise of the power of appointment limited to them jointly as hereinbefore is mentioned, limit and appoint

to the said G. C. Wilson, and her assigns, during her life, by way of jointure, and in bar of dower, in case the said intended marriage should take effect, and she should survive the said George Thompson, an annual sum or yearly rent-charge of £800 ; and also limit and appoint to the said G. C. Wilson and her assigns, during her life, in case the said intended marriage should take effect, and she should survive the said George Thompson, a further annual sum or yearly rent-charge of £700, to take effect in the event hereinafter in that behalf specified, and the same annual sums or yearly rent-charges respectively to be payable at the times and in the manner hereinafter mentioned and appointed for the payment of the same respectively, and with such powers and remedies and term of years, for enforcing or providing for the payment of the same respectively, as are hereinafter mentioned and contained.

Now this indenture witnesseth, that for effectuating the said agreement, and in consideration of the said intended marriage, and in pursuance and execution of the power or authority to the said Henry Thompson (party hereto), and W. J. Thompson, limited or reserved in or by the said in part recited indenture of appointment and release as hereinbefore is mentioned, and of every, or any other power or authority in any wise enabling them in

this behalf, they the said Henry Thompson (party hereto), and W. J. Thompson (with the privity and approbation of the said George Thompson and G. C. Wilson, testified by their respectively being parties to, and sealing and delivering these presents), do, by this present deed, by them the said Henry Thompson (party hereto), and W. J. Thompson, sealed and delivered in the presence of, and attested by, the two credible persons whose names are intended to be hereupon indorsed, as witnesses to the sealing and delivery of these presents, by them the said Henry Thompson (party hereto), and W. J. Thompson, direct, limit, and appoint, That from and immediately after the solemnization of the said intended marriage between the said George Thompson and G. C. Wilson, All and singular the said manors or lordships, or reputed manors or lordships, boroughs, castles, advowsons, messuages, lands, tenements, hereditaments, and premises, by the said in part recited indenture of appointment and release limited, To the uses and in manner hereinbefore mentioned, (except the said hereditaments limited to the use of the said Henry Thompson, party hereto, in fee-simple), shall (subject and without prejudice to the said several yearly rent-charges of £600, £800, and £1000 respectively, and the powers, and remedies, and terms of years, for securing the payment of the same respec-

tively), go, remain, and be to the uses, upon and for the trusts, intents, and purposes, and with, under, and subject to, the powers, provisoes, agreements, and declarations, hereinafter expressed and declared or referred to, of or concerning the same ; (that is to say,) To the use, intent, and purpose, that the said G. C. Wilson and her assigns, shall and may, in case she shall survive the said George Thompson, have, receive, and take, during the term of her natural life, for her jointure, and in lieu, bar, and satisfaction, of the dower or thirds, and free bench at common law, or by custom or otherwise, which she might otherwise have, claim, or demand, in, to, or out of, all or any lands or hereditaments in England or elsewhere, of which he the said George Thompson now is, or shall, during the said intended coverture, be seised for any estate of inheritance, or for any other estate, to which dower or free bench is incident, one annual sum, or yearly rent charge of £800 of lawful money of Great Britain, to be chargeable upon, and yearly issuing and payable out of, the said manors or lordships, or reputed manors or lordships, hereditaments and premises hereby limited and appointed, and to be paid quarterly, at or in the common dining hall of Lincoln's Inn, in the county of Middlesex, by equal quarterly payments on the four most usual days of payment in the year ; that is to say,

the 25th day of March, the 24th day of June, the 29th day of September, and the 25th day of December in every year, without any deduction or abatement whatsoever, on account or in respect of any taxes, charges, impositions, or assessments, already taxed, charged, assessed, or imposed, or hereafter to be taxed, charged, assessed, or imposed, on the said manors or lordships, or reputed manors or lordships, hereditaments and premises, or on the said annual sum or yearly rent-charge of £800, or the said G. C. Wilson or her assigns, in respect thereof, by authority of parliament or otherwise howsoever; and the first quarterly payment thereof to be made on such of the said days of payment, as shall happen next after the decease of the said George Thompson: And to and for this further use, intent, and purpose, that in case, when, and as often, as the said annual sum, or yearly rent-charge of £800 hereinbefore limited, or any part thereof, shall, at any time or times, be unpaid by the space of twenty-one days next after any of the days hereby appointed for the payment thereof as aforesaid, then, and so often, it shall be lawful to and for the said G. C. Wilson and her assigns, during the term of her natural life, to enter into, and distrain upon, the said manors, &c. hereby limited and appointed, or any part thereof, and to dispose of the distress or distresses, then and there found according to law, To

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the intent, that thereby, or otherwise, the said annual sum or yearly rent-charge of £800 hereby limited, and every part thereof, so in arrear and unpaid, and all costs, charges, and expenses, occasioned by reason of the non-payment thereof, shall be fully paid and satisfied; And to and for this further use, intent, and purpose, that in case the said annual sum, or yearly rent-charge of £800 hereby limited, or any part thereof, shall, at any time or times, be unpaid by the space of forty days next after any of the said days appointed for the payment thereof, Then and so often (although there shall not have been any legal demand made thereof), it shall be lawful for the said G. C. Wilson and her assigns, during the term of her natural life, to enter into and upon, and hold the said manors or lordships, or reputed manors or lordships, hereditaments and premises hereby limited and appointed, or any part thereof, and to receive and take the rents, issues, and profits thereof, to her and their own use, until she or they shall thereby, therewith, or otherwise, be fully paid and satisfied the said annual sum, or yearly rent-charge of £800 hereby limited, and the arrears thereof, due at the time of such entry, or afterwards to become due, during her or their being in possession of the same premises; Together with all costs, charges, and expenses, which she or they shall sustain by

reason of the non-payment thereof; and such possession, when taken, to be without impeachment of waste.

And to and for this further use, intent, and purpose, that if the said Henry Thompson (party hereto) and W. J. Thompson shall both die during the joint lives of the said George Thompson and G. C. Wilson, and there shall also happen, during the joint lives of the said G. Thompson and G. C. Wilson, a default or failure of issue male of the body of the said W. J. Thompson, and the said G. C. Wilson shall survive the said George Thompson, then and in such case, she the said G. C. Wilson and her assigns shall and may, from and immediately after the decease of the said George Thompson, receive and take, during the term of her natural life (in addition to the said annual sum or yearly rent-charge of £800 hereinbefore limited), one annual sum or yearly rent-charge of £700 of lawful money of Great Britain, to be chargeable upon, and yearly issuing, and payable out of, all and singular the said manors or lordships, &c. hereinbefore limited and appointed, or intended so to be, and to be paid quarterly on or at the days or times, and without deduction for present or future taxes, charges, impositions, or assessments, in such manner, as is hereinbefore mentioned and appointed, for the payment of the said

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annual sum or yearly rent-charge of £800 hereinbefore limited ; And the first quarterly payment of the said annual sum or yearly rent-charge of £700, to be made on such of the said quarterly days of payment hereinbefore appointed, for the payment of the said annual sum or yearly rent-charge of £800, as shall happen next after the decease of the said G. Thompson ; And to and for this further use, intent, and purpose, that in case the said annual sum or yearly rent-charge of £700, or any part thereof, shall be unpaid by the space of twenty-one days next after any of the days appointed for the payment thereof as aforesaid, then, and so often as the same shall happen, she the said G. C. Wilson and her assigns shall and may, for the recovery thereof, and of all costs and damages occasioned by the non-payment thereof, have and enjoy such and the like power of distraining upon all, or any of, the aforesaid manors, &c. and other hereditaments hereby charged with the payment of the same ; And also in case the said annual sum or yearly rent-charge of £700 or any part thereof, shall be in arrear or unpaid by the space of forty days next after any of the days appointed for payment of the same, the said G. C. Wilson and her assigns shall and may, for compelling payment and obtaining satisfaction for the same, together with such costs and damages as aforesaid, have and

enjoy such and the like powers of entering upon, and detaining the possession, and receiving and taking the rents, issues, and profits of, all or any of the said manors, &c. charged with the payment thereof, as hereinbefore is or are limited to and for her the said G. C. Wilson and her assigns; for enabling her and them to recover payment and obtain satisfaction of and for the said annual sum or yearly rent-charge of 800*l.* hereinbefore limited: and (subject and charged as hereinbefore is mentioned) to the use of the said (the parties of the third part) their executors, administrators, and assigns, for and during the term of two hundred years, to be computed from the death of the said G. Thompson, and thenceforth next ensuing and fully to be complete and ended, without impeachment of, or for, any manner of waste, upon the trust, and for the intents and purposes, and with, under, and subject to the powers, provisoes, agreements, and declarations hereinafter expressed and contained concerning the same; and from and after the expiration or sooner determination of the said term of two hundred years, and in the mean time subject thereto, and to the trusts thereof, to the uses, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, agreements, and declarations to, upon, for, with, under, and subject to which, the same premises, were and stood limited and settled, by virtue of or under the

between and by the said parties to these presents, that the said their ex-
ecutors, administrators, and assigns, shall
and do permit and suffer the person and per-
sons to whom the immediate reversion or re-
mainder of the said manors or lordships, &c.
comprised in the said term of two hundred
years, expectant upon the determination
thereof, shall for the time being belong, ac-
cording to the limitations aforesaid, to receive
and take the rents, issues, and profits of the
same premises, until default shall happen to
be made of or in payment of the said annual
sums of 800*l.* and 700*l.*, hereinbefore respec-
tively limited, or one of them, or some part
thereof respectively, at the times and in the
manner hereinbefore appointed for payment
of the same respectively; and that in case the
same annual sums, or yearly rent-charges of
800*l.* and 700*l.*, or either of them, or any
part thereof respectively, shall happen to be
behind or unpaid by the space of forty days
next after any one of the said days, whereon
the same respectively are hereinbefore directed
to be paid, then and in such case, and so
often as the same shall happen, the said

or the survivors or survivor of them, or the executors, administrators, or assigns of such survivor, do and shall from time to time by and out of the rents, issues, and profits of the said manors, &c. comprised in the said term of two hundred years, or by

demising, leasing, or mortgaging the same premises, or any part thereof, for all or any part of the said term, or by bringing actions against the tenants or occupiers of the same premises for recovery of the rents and profits, or by such other reasonable ways or means, as to the said or the survivors or survivor of them, or the executors, administrators, or assigns of such survivor, shall seem meet, levy, raise, and pay the said annual sums or yearly rent-charges of 800*l.* and 700*l.* hereinbefore respectively limited, or such of them as shall be so in arrear, and all arrears thereof respectively, which shall be then due and unpaid, or which shall afterwards, during their continuance in possession, accrue of the same, and all costs, damages, and expenses, which the said G. C. Wilson, her executors, administrators, or assigns, or the said

, or any of them, their, or any of their executors, administrators, or assigns, or any of them, shall be put unto or sustain by reason of the non-payment thereof, or the recovering or obtaining thereof, or otherwise relating thereto; and do and shall pay the surplus, if any, of the monies to be raised by the ways and means aforesaid, to the person or persons next in remainder or reversion for the time being immediately expectant upon the determination of the said term of two hundred years, according to the limitations aforesaid.

Provided always, and it is hereby agreed and declared between and by the parties to these presents, that immediately after all the trusts hereinbefore declared of and concerning the said term of two hundred years shall in all respects be fully performed and satisfied, or shall become unnecessary, or incapable of taking effect, and the said , and every of them, their and every of their executors, administrators, and assigns, shall be fully reimbursed and satisfied all costs, charges, and expenses, if any, to be occasioned by, or relating to, the trusts hereby reposed in them as aforesaid, the said term of two hundred years shall, subject and without prejudice to any disposition which shall have been made of the premises comprised therein, or any of them, or any part thereof, for the purposes aforesaid, absolutely cease and determine.

Provided always, and it is hereby agreed and declared between and by the parties to these presents, that the uses, trusts, intents, purposes, powers, provisoes, agreements, and declarations, hereinbefore respectively limited and declared, or referred to, of, or concerning the said manors or lordships, or reputed manors or lordships, hereditaments, and premises hereinbefore limited and appointed, or expressed and intended so to be, shall respectively take effect, in such manner in all re-

spects, as if the uses, trusts, intents, purposes, powers, provisoes, agreements, and declarations, hereinbefore limited and declared expressly, and not by reference to the uses, trusts, intents, purposes, powers, provisoes, agreements, and declarations limited and declared by the said indenture of appointment and release, had been originally inserted and contained in the same indenture; to the intent, and so that, the said uses, trusts, intents, purposes, powers, provisoes, agreements, and declarations hereinbefore limited and declared expressly, and not by reference as aforesaid, shall or may by virtue of or under the exercise of any of the powers hereby respectively limited, or created by reference to the powers of leasing, and of sale and exchange respectively, limited or created by the said indenture of appointment and release, be over-reached to the same extent, and in the same manner, as if the said powers of leasing and of sale and exchange respectively, had been expressly limited by this present indenture, and been made to over-reach all and singular the other uses, trusts, intents, purposes, powers, provisoes, agreements, and declarations, hereinbefore limited and declared, whether expressly or by reference as aforesaid; and to the intent, and so that, the trusts and provisoes in these presents declared and contained, by reference to the trusts and provisoes in the said indenture of appointment and re-

lease declared and contained, as to the application of the monies to arise from any sale or sales, or to be received for equality of exchange, under the said powers of sale and exchange, shall or may take effect to the same extent, and in the same manner, as if the same had been expressly declared and contained in this present indenture, and had expressly been made applicable to all the other uses, trusts, intents, purposes, powers, provisoes, agreements, and declarations, hereinbefore limited and declared, whether expressly or by reference as aforesaid.

Provided always, and it is hereby declared, that the said trustees hereby nominated and appointed, and every of them, and the executors, administrators, and assigns of them, and every of them, shall be charged and chargeable respectively only for such monies, as they shall respectively actually receive by virtue of the trusts hereby in them reposed, notwithstanding his or their, or any of their giving or signing, or joining in giving or signing, any receipt or receipts for the sake of conformity, and any one or more of them shall not be answerable or accountable for the other or others of them, or for the acts, receipts, neglects, or defaults of the other or others of them, but every of them only for his and their own acts, receipts, neglects, or defaults respectively ; and that any

one or more of them shall not be answerable or accountable for any banker or other person, with whom, or in whose hands, any part of the said trust monies shall or may be deposited or lodged for safe custody, or otherwise, in the execution of the trusts hereinbefore mentioned; and that they or any of them shall not be answerable or accountable for any misfortune, loss, or damage, which may happen in the execution of the aforesaid trusts, or in relation thereto, except the same shall happen by or through their own wilful defaults respectively: and also that it shall and may be lawful to and for them the said trustees in these presents named, and every of them, their, and every of their executors, administrators, and assigns, by and out of the monies, which shall come to their respective hands by virtue of the trusts aforesaid, to retain to, and reimburse himself and themselves respectively, and also to allow to his and their co-trustee or co-trustees, all costs, charges, damages, and expenses, which they or any of them, shall or may suffer, sustain, or be put unto, in, or about the execution of the aforesaid trusts, or in relation thereunto.

And each of them the said Henry Thompson (party hereto) and W. J. Thompson, so far only as relates to his own acts and deeds, and the acts and deeds of persons claiming, or to claim under or in trust for him, doth

for himself, his heirs, executors, and administrators, covenant, promise, and agree with and to the said _____, their executors, and administrators, by these presents, in manner following; (that it is to say,) that for and notwithstanding any act, deed, matter, or thing by them the said Henry Thompson (party hereto) and William John Thompson, or either of them, made, done, committed or executed, or knowingly or willingly suffered to the contrary, the power or authority herebefore exercised by the said Henry Thompson (party hereto) and William J. Thompson, is well and effectually created by the hereinbefore in part recited indenture of appointment and release, and the same, at the time of the sealing and delivery of these presents, is in full force and in no wise weakened, extinguished, suspended, or become void: and that (for and notwithstanding any such act, deed, matter, or thing whatsoever as aforesaid) they the said Henry Thompson (party hereto) and W. J. Thompson now have in themselves good right, full power, and lawful and absolute authority, to direct, limit, and appoint the said manors or lordships, &c. and other hereditaments hereinbefore limited and appointed, or expressed and intended so to be, with the rights, members, and appurtenances, to the uses and in manner aforesaid, according to the true intent and meaning of these presents: and that the same manors,

&c. and other hereditaments, with their rights, members, and appurtenances, shall and may from time to time, and at all times hereafter, go and remain, to the uses hereinbefore limited and declared, and be peaceably and quietly entered into and upon, and be held, occupied, possessed, and enjoyed, and the rents, issues, and profits thereof, and of every part thereof, had, received, and taken accordingly, without the lawful let, suit, trouble, denial, eviction, interruption, claim, or demand whatsoever, of or by them the said H. Thompson party hereto, and W. J. Thompson, or either of them, or either of their heirs, or of or by any other person or persons lawfully or equitably claiming, or to claim, by, from, or under, or in trust for him, them, or any of them, other than persons claiming under, or in respect of, any of the leases, or agreements for leases, under which the same hereditaments are now held by the tenants or occupiers thereof, or under or in respect of any of the charges hereinbefore mentioned, or referred to; and that free and clear, and freely and clearly, and absolutely, acquitted, exonerated, released, and for ever discharged, or otherwise, by the said H. Thompson (party hereto) and W. J. Thompson, or one of them, or their, or one of their, heirs, executors, or administrators, well and sufficiently saved, defended, kept harmless, and indemnified, of, from, and against all,

and all manner of former estates, titles, troubles, charges, debts, and incumbrances whatsoever, either already had, made, executed, occasioned, or suffered, or hereafter to be had, made, executed, occasioned, or suffered, by the said H. Thompson (party hereto) and W. J. Thompson, or either of them, or either of their heirs, or by any person or persons lawfully or equitably claiming, or to claim by, from, or under, or in trust for them, or any of them (other than the said subsisting leases or agreements for leases and the said charges hereinbefore referred to) : And further, that they the said H. Thompson (party hereto) and W. J. Thompson, and each of them, and their respective heirs, and all and every other persons or person having, or claiming, or who shall or may have or claim, any estate, right, title, interest, inheritance, use, trust, property, claim, or demand whatsoever, either at law or in equity, of, in, to, or out of the said manors, &c. and other hereditaments hereinbefore limited and appointed or expressed and intended so to be, or any of them, or any part thereof, by, from, or under, or in trust for them, the said H. Thompson (party hereto) and W. J. Thompson, or either of them, (other than persons claiming under, or in respect of, any of the said leases or agreements for leases and charges hereinbefore excepted) shall and will, from time to time, and at all times hereafter, upon every reason-

NOTES.

NOTE A.

BESIDE the general receipt expressed in the body of the deed, it is usual to indorse a particular one; but this practice is of a modern date, see 2 Atk. 478. 3 Atk. 112. It is a rule of equity, that from the time of the contract the vendor is considered, as to the estate, a trustee for the purchaser; and the vendee, as to the money, a trustee for the vendor. See *Green v. Smith*, 1 Atk. 573. *Pollexfen v. Moor*, 3 Atk. 273. note 2. Although a receipt for the purchase money be signed, yet if the money be not actually paid, a court of equity will give relief. See *Ryle v. Haggie*, 1 Walker and Jac. 234.

NOTE B.

BEFORE the statute of frauds (29 Car. 2. c. 3), if a rent had been granted to A. his *exe-*

cutors and *administrators*, during the life of B., and A. had afterwards died during the life of B., the executor or administrator should not have been a special occupant. 16 Vin. 71. pl. 5. 73. pl. 3. (G.) Buller v. Cheverton. But the 12th section of the act enacts, “ That
 “ from henceforth any estate *per auter vie*
 “ shall be devisable by a will in writing,
 “ signed by the party so devising the same,
 “ or by some other person in his presence, and
 “ by his express directions, attested and sub-
 “ scribed in the presence of the devisor by
 “ three or more witnesses; and if no such de-
 “ vise thereof be made, the same shall be
 “ chargeable in the hands of the heir, if it
 “ shall come to him by reason of a special oc-
 “ cupancy, as assets by descent, as in case of
 “ lands in fee-simple; and in case there be
 “ no special occupant thereof, it shall go to
 “ the *executors* or *administrators* of the party
 “ that had the estate thereof by virtue of the
 “ grant, and shall be assets in their hands.”
 Since this statute, the executor or administra-
 tor may be a special occupant^a of a rent. See

^a i. e. *Quasi* special oc-
 cupant; for in the nature of
 things there cannot be an
 actual occupant of rent.
 See lord Eldon's argument
 in Ripley v. Waterworth, 7
 Ves. 425. The point, as to
 the special occupancy, can
 now scarcely arise. In
 every modern grant of an
 annuity, there is a covenant

to pay the annuity to the
 annuitant, his executors or
 administrators, with the
 usual powers of enforcing
 payment by entry and dis-
 tress, and with a term of
 years for further securing it;
 so that if the rent should de-
 termine as rent, it would
 be still payable as an annual
 sum under the covenant and

Rawlinson v. Montague, cited note D.3 P. W. 264.

By the statute 14 Geo. 2. c. 20. s. 9. it is enacted, " That estates *per auter vie*, in case " there shall be no special occupant thereof, " of which no devise shall have been made " according to the said act for prevention of " frauds and perjuries, or so much thereof as " shall not have been so devised, shall go, be " applied, and be distributed, in the same " manner as the personal estate of the testa- " tor or intestate." An estate *per auter vie*, when limited to the *executors*, must be considered as *personal* estate^a (see Williams v. Jekyll, 2 Ves. 681. 683, 684. 4 Term Rep. 230. Ripley v. Waterworth, 7 Ves. 425. Milner v. Harewood, 18 Ves. 273.), although it is to be conveyed as a freehold estate^b. See Irish Chan. Rep. 290. per Lord Redesdale. However, an estate *per auter vie*, when made to the grantee *and his heirs*, is liable to debts by specialty, and is within the statute of

term of years, and might, I apprehend, be distrained for as such. See Allerton v. Eden, Noy. 5. 6 Vin. 393. pl. 11. Moor, 179. pl. 318. 185. pl. 331.

^a i. e. For all purposes; for in Williams v. Jekyll, lord Hardwicke, 2 Ves. 681. considered it as a chattel for the purpose of construction. See lord Redesdale's argument in Campbell

v. Sandys case, 1 Schoal. 291. It would follow, that this kind of property, although freehold, would not, from mere intention, pass by a general devise of *real* estate.

^b And it can only be devised by a will attested by three witnesses. Per lord Eldon in Ripley v. Waterworth, 7 Ves. 451.

fraudulent devises, 3 and 4 William and Mary, c. 14. Westfaling v. Westfaling, 3 Atk. 460.

NOTE C.

THE covenant or proviso enabling the grantee to *enter* and *hold* the land, until the arrears be satisfied, creates an interest, which enables him to recover the possession in ejectment. It was formerly holden, that, in such case, an actual entry was necessary in order to support an ejectment; but it was settled previously to the statute 4 Geo. 2. c. 28. that the general confession was sufficient, without the proof of an actual entry. See Gilb. Ejectment, 20, 21. ed 1781.

It is generally true, that no person can take advantage of a condition of entry, unless there be a previous demand of the rent, or unless it be expressly stipulated to the contrary. Co. Litt. 201. b. 5 Co. 40. b. 1 Roll. Ab. 459.

NOTE D.

UPON the grant of a rent-charge the grantee has the choice of one of two remedies for

the recovery of it, when in arrear; by distress, and by writ of annuity; but he cannot make use of both of them at the same time. Litt. sec. 219. This double provision, however, does not extend to rents *reserved* to the grantor, nor to rents created by will, or granted for equality of partition, or in lieu of dower. Co. Litt. 144, a. b. 145, a. 1 Roll. Ab. 226. 6 Co. 58. b. So if a man grant, that if A. be not paid a certain yearly sum, he may distrain for it in the manner of D.; this is a good rent-charge, and yet a writ of annuity will not lie for the recovery of it. Litt. s. 221.

NOTE E.

THE grantor covenants for himself, his heirs, executors, and administrators, not only to pay the annuity, or rent-charge, when it shall become due, but also a proportional part of it from the time, which shall elapse between the last quarterly day of payment next preceding the death of the grantor and the day of his decease. This provision is necessary; for if the grantor die before the day of payment, the annuity and rent-charge are determined; and equity will not make any apportionment of it in favour of the grantee. *Pearly v. Smith.* 3 Atk. 261. The payment

of an annuity or rent is similar in this case to the application of dividends arising upon money in the public funds, payable to one for life; in which case, if the person, to whom they are made payable, should die before the day of payment, they cannot be apportioned. *Vide Rashleigh v. Masters*, 3 B. C. R. 99. 101. *Wilson v. Harman*, 2 Ves. 672. *Amb.* 279.

By the common law, if tenant for life had made a lease for years, which determined by his death, and had died before the rent was due, the rent was lost, both to the executors, and those in remainder or reversion. *Vide* 2 P. W. 502. 1 P. W. 392. But the statute 11 Geo. 2. c. 19. s. 15. gives an action on the case to the executors and administrators of the tenant for life to recover from the under-tenants such proportionable part of the rent, as shall be incurred from the last day of payment to the decease of the tenant for life. In the case of *Paget v. Gee* (*Amb. Rep.* 198.), it was said, that, by an equitable construction, the above statute extended to leases for years made by tenants in tail, not warranted by the statute 32 Hen. 8. c. 28. and also to leases for years made by tenants for years determinable on their own lives. But see *Vernon v. Vernon*, 2 Bro. Cha. Ca. 659. So as to compositions for tithes. *Aynsley v. Wordsworth*, 2 Ves. and B. 331. The statute does not

extend to leases made in exercise of a power. See *Strafford v. Wentworth*, Prec. Cha. 557. and the case *ex parte Smyth*, 1 Swanst. 337. where the subject of appointment is very fully stated and commented on.

NOTE F.

FOR acts, which do, or do not, amount to a breach of the covenant against prior incumbrances, see *Hamington and Rydear's case*, 1 Leon. 92. 1 Keb. 427. *Dyer*, 139. a. *Ander*. 236. 2 Vern. 45.

NOTE G.

IT should seem, that the further assurance must be at the costs of the persons to whom the conveyance is made, unless it be provided to the contrary. See 1 Buls. 90. And in *Heron v. Treyne*, 2 L. Ray. 750. it was said, that in a covenant to make further assurance at the costs of B. notice of the kind of assurance must be given to him, before he ought to tender the costs; but otherwise, if the covenant be to make a particular conveyance.

NOTE H.

It has been repeatedly determined, that parol evidence cannot be admitted to prove, that it was originally the agreement of the parties, that the grantor should be at liberty to re-purchase the annuity. *Iruham v. Child*, 1 Bro. 92. *Portmore v. Morris*, 2 Bro. 219. *Hare v. Sherwood*, 3 Bro. 168. Clauses of re-purchase have therefore become very frequent in grants of annuities.

A clause of this kind in the grant of an annuity is introduced upon the same principle, that a vendor of an estate in fee-simple stipulates with his vendee, that he may be at liberty within a given time, and for a certain price, to re-purchase the estate. See 1 *Bridg. Con.* 56. *Amb.* 19. An annuity, granted subject to a clause of re-purchase, differs from a mortgage or security for money in these points: in a mortgage the principal debt still continues, until the equity of redemption be foreclosed; but upon the purchase of an annuity, the principal is gone for ever, and consequently if the re-purchase be made, the money paid upon that occasion is not in discharge of a debt, but as the consideration for a new purchase. So a mortgage is the personal estate of the mortgagee, though it be

made to him *in fee*; but an annuity is considered as the real estate of the grantee, if it have a freehold quality. 2 Atk. 497. 1 Ves. 403.

However, as courts of equity lean very much against contracts of this kind, because they tend to obtain more than legal interest, they have been always anxious to find out reasons, applicable to the particular case, for construing sales of annuities as mere securities for money lent, and thereby to suffer a redemption, as in the common case of a mortgage. To use the words of lord Hardwicke (3 Atk. 279.), "There has been a long struggle between the equity of this court, and persons who have made it their endeavour to find out schemes to get exorbitant interest, and to evade the statutes of usury." In deciding therefore upon cases of this nature, the court has generally considered them in two points of view: first, Whether they ought to be reckoned (considering all the circumstances) as absolute sales, or merely as securities for money lent? Secondly, Admitting them to be sales, whether there be any grounds to relieve against them? See *Lawley v. Hooper*, 3 Atk. 278. and the cases cited in the note to the last edition.

NOTE I.

If it be intended that the releasee should take an estate in fee-simple or fee-tail, it is absolutely necessary, that it should be ascertained by words of limitation. Litt. s. 465.

It may not be unacceptable, in this place, to offer a few observations upon the different powers of the premises and the habendum, when both limit distinct estates, and in such limitation are repugnant to, and inconsistent with, each other.

It may be deemed an established rule, that where no estate is expressed in the premises (in which case the grantee has an estate for life by implication), and an express estate is limited by the habendum, the habendum shall control the implied estate created by the premises. Co. Litt. 183. a. Thus, if land or rent be granted to I. S. generally, habendum to him *for years*, or *at will*; by the premises I. S. takes an implied estate for life, but the habendum abridges it into an express estate for years, or at will. *Ibid.* 8 Co. 154. b. In such a case, if the habendum be void, yet the implied estate for life created by the premises shall not hold against the express estate made by the habendum, though such ex-

press estate be altogether ineffectual. Therefore, if land be given to A. generally, by the premises, habendum after the death of the grantor to A. in fee, in tail, or for life, in this case the whole deed is void ; for there can be no estate of freehold made to commence *in futuro*, and the implied estate for life cannot make it a grant to begin presently in possession. 2 Co. 55. a. b. Cro. Eliz. 254, 255. but if there be an *express* estate limited to A. in fee by the premises, habendum after the death of the grantor to A. in tail ; in this case the habendum is void, and A. shall take a present estate by the premises. 3 Lev. 339. Carter v. Madgwick. Vide Dyer, 272. a. pl. 30. 2 Roll. Ab. 66. pl. 4. Hob. 171. Moor, 881. pl. 1236.

So it is a rule, that where an express estate is limited in the premises, and an estate is created by the habendum in abridgment of, inconsistent with, or repugnant to, the estate limited in the premises, in such case the premises shall be good, and the habendum void. Thus if lands be conveyed to I. S. and his heirs, habendum to him for life ; I. S. has an estate in fee by the premises, and the habendum is void. 8 Co. 56. b. 2 Co. 24. a. Plowd. 152, 153. 2 Bac. Ab. 494.

We are to observe, with respect to this rule, that whenever a ceremony or formality

is requisite to the perfection of the estate limited in the premises, besides the delivery of the deed (such as livery of seisin), and no other ceremony is necessary to complete the estate limited by the habendum, than the mere delivery of the deed; in all such cases the estate created by the habendum shall stand, and that limited by the premises shall be void. Thus if A. grant an estate to B. and his heirs, habendum to B. for years, the habendum shall abridge the estate in fee given by the premises into an estate for years. 2 Co. 24. a. The reason of this construction is, that by the delivery of the deed the estate for years limited by the habendum is perfected; whereas another process (viz. livery of seisin) is required to vest the estate of freehold. When B. has the estate for years once vested in him, no subsequent ceremony can divest it out of him. This construction evidently depends upon the actual priority of the delivery of the deed; and I conceive, that it will hold in the case of a bargain and sale, because the inrolment, like livery of seisin in the case of a feoffment, will come too late to divest the estate for years previously vested in B. by the delivery of the deed. But the reasons of this construction do not, I apprehend, apply to the conveyance by lease and release; for if a man convey by lease and release to B. in fee, habendum to him for years, the fee, as well

as the term of years, may vest in B. by the mere delivery of the deed; and as the law says, that every grant shall be taken most strongly against the grantor, B. will have an estate in fee by the premises, and the habendum will be void, according to the rule just mentioned. So upon the same principle, if a grant had been made of a rent *in esse*, or a seignory, to I. S. and his heirs, habendum to him for years, or for life; although in this case another ceremony was formerly requisite, besides the delivery of the deed, viz. attornment, yet as that ceremony was as necessary upon the grant of a rent *in esse*, or seignory, to create an estate for years or for life, as an estate in fee, the habendum in such case was void. 2 Co. 24. a.

This rule, that where the habendum is repugnant to, or inconsistent with, the express estate limited in the premises, the habendum is void, was evidently established in favour of the grantee, and to the disadvantage of the grantor; for where an express estate in fee-simple is given by the premises, the grantor shall not be allowed to abridge it by the habendum into a mere estate for years or for life. But the reasons of the above rule fail, whenever the grantee's interest is enlarged by the habendum, even where there is an express estate limited to him by the premises. Therefore what has been advanced concerning

the above rule may be corrected with this observation, that the habendum, when inconsistent with, or repugnant to, the premises, can never abridge an express estate given by the latter to the grantee, whenever there is the same ceremony required to perfect the estate limited in the premises, and that created by the habendum; but that the habendum may enlarge the estate limited in the premises under similar circumstances. Thus if an estate be granted to A. for life, habendum to him in fee, the same formality being requisite to create both estates, the habendum shall enlarge the estate for life into an estate in fee. Co. Litt. 299. a.

It is clear also, that the above doctrine in favour of the grantee depends chiefly upon the inconsistency and repugnancy of the habendum. Thus to put the same case again, an estate is given to A. and his heirs, habendum to him for life: this habendum is totally void, and A. has a fee-simple by the premises: the former creates an estate of inheritance, whilst the habendum limits it to an estate for life; the habendum therefore is quite inconsistent with, and repugnant to, the premises. But though the grantor be not allowed entirely to alter the nature of the estate of the grantee, yet he is suffered to qualify it, if there be no inconsistency in so doing. Therefore if a man grant lands to another

and his heirs, habendum to him and the heirs of his body ; in such case the habendum qualifies the premises, and the grantee has an estate tail, with a fee-simple expectant thereon. Co. Litt. 21. a. Turnman v. Cooper, Cro. Jac. 476. (Sed *contra*, as to the expectant fee thereon, Perk. s. 170. 8 Co. 154. b.) The word heirs is extensive, and may relate to heirs special, as well as general ; and the grantor by the habendum signifies what heirs he intended to describe. Upon the same principle, if a conveyance be made to A. and his heirs, habendum to him and his heirs during the lives of B. C. and D. ; the word heirs, in this case, in the premises is as applicable to a descendible estate of freehold, as to a fee-simple ; the habendum therefore explains the premises ; it declares, that the word *heirs* in the premises was merely applicable to an estate of freehold descendible to heirs during the lives of B. C. and D. T. Jones, 4. So too if lands be granted to A. and the heirs of his body, habendum to him in fee ; A. has by the premises an estate tail, and by the habendum a fee-simple expectant thereon. 8 Co. 154. b.

The habendum is sometimes used to explain the nature of the estates, which grantees are intended to take. Thus if a feoffment be made to A. and B. of twenty acres, habendum, as to one moiety, to A., habendum, as

to the other moiety, to B.; by the premises A. and B. take a joint estate, and by the habendum they are tenants in common; and yet the habendum is good. Co. Litt. 183. b. 190. b. The habendum, in this instance, is not repugnant to the premises, because it makes no division of that undivided possession, which is given by the latter. However, if the premises limit twenty acres to A. and B., and the habendum expressly give ten acres to A. and the other ten acres to B., the habendum is void; for it makes an express division of the acres; which is inconsistent with the undivided possession limited by the premises. 1 P. W. 19.

So if a lease be made to two, habendum to the one for life, remainder to the other for life, this habendum is good. 2 Co. 55. b. Co. Litt. 183. b. Dowse's case. Cro. El. 25. 89. 2 Roll. Ab. 65.

A grant was made to A., habendum to him, B., and C., *pro termino vitæ eorum, et alterius eorum successive diutius viventium*; it was holden, that the habendum was void: for neither B. nor C. could take any thing as lessees in possession; because they were not parties to the deed; nor were they named in the premises; nor could they take jointly by way of remainder; because the limitation was to them *successive*; neither could they

take in succession, because it did not appear, who should take first. Hob. 313. *Windsmore v. Hobart*.

NOTE K.

THE mode of preventing dower, introduced in this precedent, appears to have been suggested by the late Mr. Fearne (vide *Cont. Remainders*, 509. 4 ed.), in consequence of the principle established in *Duncombe v. Duncombe*, 3 Lev. 437.

For the different methods of barring a woman of her dower, see Mr. Butler's notes, Co. Litt. 216. a. and under fol. 381. b.

NOTE L.

THE grantor covenants, 1st, That, notwithstanding any act done by him or his ancestors, he is seised in fee. 2dly, That, notwithstanding any such act, he has a good right to grant, &c. 3dly, That the grantee may peaceably enjoy the premises without any interruption, &c. by the grantor, or by any other person or persons claiming by or under him or his ancestors. 4thly, That the premises are free from all incumbrances, &c.

occasioned by him or his ancestors, or any claiming under them. The two first covenants may be considered synonymous (Brown-
ing v. Wright, 2 Bos. and Puller, 13.); but the two latter are distinct; and therefore qualifying words in the beginning of the first covenant, will not extend to the third. See Howell v. Richards, 11 East. 633.

In the case of *Nervin v. Muns*, 3 Lev. 46. a grantor covenanted, 1st, That notwithstanding any act done by him to the contrary, he was seised in fee-simple, &c. 2dly, That he had a good power and lawful authority to sell. 3dly, That the lands were free from any incumbrances made by him, his father, or his grandfather. 4thly, That the grantee should enjoy against all persons claiming under him, his father, or his grandfather. The question was, whether the words in the first covenant, *notwithstanding any act done by him*, extended to the second covenant? For if they did, then there was no breach of covenant. It was admitted by the whole court, that all these covenants were several and distinct; and three of the judges held, against the opinion of North, C. J., that, though these covenants were distinct, yet the two first were synonymous, and of the same nature; for if a man were seised in fee, he certainly had good right and full power to sell: and it could not be intended, that when the grantor

covenanted against his own acts, he should immediately after, by a covenant of the same nature, covenant against the acts of the whole world.

It is however clear, that where covenants are several, and at the same time are of different natures, and concern different things, restrictive words in one covenant will not qualify or restrain the generality of the other. This point is explained in the case of *Gainsford v. Griffith*, 1 Saund. 58. 2 Keb. 201. 213. 1 Sid. 328. A lessor covenanted, that the lease in question was a good, certain, and indefeasible lease in the law, and should so remain for the residue of the term; and that the lessee should quietly and peaceably enjoy and hold the premises during the term, without the lawful let, suit, trouble, or interruption of the lessor, his executors or administrators; and that the lessee should be saved harmless, and indemnified from all incumbrances, made, committed, suffered, or done by *the lessor*: the question was, whether the restrictive words at the end of the last covenant qualified and explained the first? and it was holden, that they were distinct sentences, and of different natures; and therefore the words at the end of the last sentence, which qualified the covenant against incumbrances to such incumbrances as were committed by the lessor, could not extend to the former

covenant ; that the lease was a good, inde-feasible lease, &c.

So, where a man covenanted, that he was seised of a certain manor in fee, notwithstanding any act done by him or any of his ancestors ; and that no reversion or remainder was in the king, or any other ; and that the said manor was of the annual value of three hundred pounds per annum ; it was holden, that these covenants were absolute and distinct, and that the restrictive words in the first covenant could not qualify the last sentence respecting the value. *Crayford v. Crayford*, Cro. Car. 106. The same point was determined in the case of *Hughes v. Bennet*, Cro. Car. 495.

However, when several sentences make but one entire covenant, restrictive words in one sentence may be extended to, and qualify, the other sentences ; provided the sense will admit of it. Thus, where a termor assigned his term, and covenanted, that he had not made any grant, or done any thing, by means whereof the grant or assignment could in any manner be impaired, hindered, or frustrated ; *but that* the assignee should enjoy without any impediment or disturbance by him or any other person : it was adjudged, that this was but one sentence, and that the express restrictive words in the beginning of the co-

venant restrained and qualified the generality of the subsequent words, *by any other person*. Dyer, 240. a b. pl. 43. Gervis v. Pead, Cro. El. 615.

In the case of *Trenchard v. Hoskins* (Litt. Rep. 62. to 69. 203. to 211.), a grantor covenanted that he was seised in fee, and that he had a good and lawful authority to sell, and that there was no reversion or remainder in the crown, notwithstanding any act done by him. The question was, whether the last restrictive words explained the preceding covenants, that he was seised in fee, &c.? It was determined in the Common Pleas, that these were three distinct and several covenants, and therefore the restrictive words in the last sentence could not extend to the first. But, upon a writ of error in the King's Bench, this judgment was reversed (2 Keb. 201.), though that reversal was never entered. 1 Sid. 328. The opinion of the Court of King's Bench, that the three sentences in the above case made but one entire covenant, seems to be over-ruled by the subsequent decision in the before-cited case of *Nervin v. Muns*.

It should seem, that an express covenant may qualify and restrain the operation of a preceding *implied* covenant. Thus, any express covenant on the part of a grantor will qualify the generality of the implied covenant,

or warranty, produced by the word *grant*, when that word is used to pass a *chattel* interest; for it seems, with respect to a freehold, or inheritance, that that word does not import any warranty or implied covenant. See But. Co. Litt. 384. a. n. 1. 1 Ves. 101. Vaugh. 126. 4 Co. 80. b. Noke's case. It must be observed, that, in grants of estates of freehold, the word *give* creates an implied warranty, the generality of which cannot be controlled by any express covenant. Co. Litt. 384. a. Litt. Rep. 64. So, if a man make a lease for years rendering rent, and add express warranty; the express warranty does not take away the warranty in law; for the lessee has his election to vouch by force of either of them. 4 Co. 81. a. Co. Litt. 384. a.

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reversion ye freed should be kept on foot so as to support the estate
of the child this may be done in two ways.

1st By conveyance to A for life of ye supposed tenant in tail &
intent if he may convey to the intended tenant to ye use of
the same lands for the joint lives of 2 persons under the conveyance
there will be a sufficiency to support the recovery & the whole
for life will be a contingent estate support the claims of ye

2^{ndly}. Or ye lands may be conveyed to A for life of ye supposed
tenant in tail to ye use of B for joint lives, reversion or for
ye life of ye tenant in tail to the intent that a recovery may be
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free to

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